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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1906.

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JAMES H. MCKENNEY,
Clerk

A. B. BALLARD AND JOSEPHINE W. BALLARD,
Plaintiffs in Error.

VS.

No. 123.

CHAS. W. HUNTER, A. HACKLER AND THE BOARD OF DIRECTORS OF THE ST. FRANCIS LEVEE DISTRICT,
Defendants in Error.

Writ of Error to the Supreme Court of the State of Arkansas.

STATEMENT OF CASE FOR A. B. BALLARD AND JOSEPHINE W. BALLARD, PLAINTIFFS IN ERROR.

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Of Counsel for A. B. Ballard and Josephine W. Ballard.

PAUL A. DOUGLASS CO., PRINTERS, MEMPHIS.

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The General Assembly of the State of Arkansas on the 15th day of February, 1893, by Act No. 19 of the year 1893, created eight counties, or portions of those eight counties, constituting what is known there as the "St. Francis Basin," a Levee Dsitrict, for the purpose of constructing and maintaining levees against the waters of the Mississippi River, and incorporated a Board of

Directors, and gave that board power to levy and collect levee taxes, and prescribed and authorized the use of the taxes for the location, construction and maintenance of the levees.

This act was amended by Act No. 75, and Act No. 100, of the same session, and subsequently by Act No. 71 of the Acts of the year 1895. These acts may be seen in the published Acts of 1893, pages 24, 119, 172; and published Acts of 1895, page 88, and the questions presented in this case arise out of those acts, and what has been done under them, and copies of the portions of them, material here, are printed in the appendix to the brief.

The original act declared that for the purpose of building, repairing and maintaining the levee authorized, the Board of Levee Directors should have the power and it was made its duty to assess and levy annually, a tax, not exceeding 5 per cent. of the increased value or betterment, estimated to accrue from protection given against floods from the Mississippi River by the levee, on all the lands within the Levee District, provided that there should first be a meeting of the owners of the lands in the respective counties within the Levee District, in each county, of which meetings notice should be given in a prescribed way, and that at the meetings the proposition to levy the annual assessment should be submitted to the land owners, and that if a majority of all the land owners in the Levee District appeared at the meetings in person, or by legal proxies, and two-thirds of those present voted for the assessment, then the levee tax should be assessed. See Section 5.

Other acts to be done were prescribed before the levy of the tax, and then it was declared in Section 7, that the Board of Directors should elect an assessor, a land owner in the district, from each county, and all of them should constitute the Board of Assessors for the Levee District, and each assessor for the county he represented, and should make an assessment of all the lands in the

district, in books to be provided by the Levee Board, for that purpose. The lands were required to be entered upon the books, in convenient subdivisons, as surveyed by the United States, with appropriate columns, showing the names and residences of the owners of such lands, and mortgages, of record, if any known to the assessors, and also a description of the lands, and the number of acres cleared, as nearly as the assessor could ascertain without measuring, and the value thereof, as assessed without levee protection, and the value thereof as estimated, increased by levee protection.

After the assessments had been made in the respective counties, by the assessors elected, respectively, those assessors were required to meet as a Board of Equalization, and to equalize the assessments in the respective counties, and the assessments as so equalized were declared to be the assessment of the Levee District for that year, and until the next assessment. See Section 8.

By Section 9, the Board of Levee Directors was required to hold a regular annual meeting on the second Tuesday in May of each year, at the place selected as the domicile of the Board of Directors, and the president of the board was required to lay before the board the annual report of the chief engineer, with the maps, papers and estimates accompanying the same, and the last assessment, showing *the aggregate sum* upon which a tax for levee purposes might be levied; and also a report of the treasurer of the board, showing *the financial condition* of the Levee District.

After examining *the reports*, the Levee Board was required to decide *what work* it would undertake to do during that official year, and *the rate* per cent. on *the aggregate increased value* of lands in the Levee District, that *would be necessary to raise* a sum sufficient to pay *for such work*, as provided in Section 5 of that act, pro-

vided that the tax to be levied should not exceed 5 per cent., as provided.

Section 10 of the act made the assessment a lien on the land assessed, in the nature of a mortgage, and provided that the assessment should bear interest.

And Section 11, provided for the election of a collector, to collect the levee taxes, and prescribed what he should do in order to effect the collection.

The collector was to be furnished with a list of the assessments of the county for which he was appointed, and required to proceed on the first Monday of October, to make collections. If the assessments were not paid within thirty (30) days then the collector was required, in the name of the Levee Board, to enforce the collection thereof, by Chancery proceedings, in the courts of the county in which the lands were situated, having Chancery jurisdiction. And the court was required to give judgment against the owner of the land for the amount of the assessment, and interest thereon, and a penalty of 25 per cent. on the amount of the assessment; and also all the costs of the proceedings, and to cause the lands to be sold by a commissioner to be appointed by the court.

The judgment, the act provided, should not extend to any property except the land charged with the assessment. If lands were offered for sale and no one should buy them for the amount of the taxes, penalties and cost due, then the treasurer of the Levee Board was required to buy them in the name of the Levee Board, and the commissioner was to make the Levee Board a deed for the lands thus bought.

The act declared that all persons having an interest in the lands, or recorded liens thereon, should be bound by the judgment and decree rendered in the suit, in the same manner as in other *Chancery suits*, saving to in-

fants and insane persons, having no guardian or curator, the rights they then had by law to appear and except to the said proceedings within twelve months after their disabilities were removed. (See Section 12.)

The act then declared that the suit provided for, should *be conducted* in the name of the St. Francis Levee District, and *in accordance with* the practice and proceedings of *Chancery Courts in Arkansas*, and that the law should be liberally construed, to give the assessments *the effect* of *bona fide* mortgages for a valuable consideration, *and a first lien* upon the said lands, as against all persons having an interest therein.

There was a proviso in Section 7, that no error in the description of the lands should invalidate the assessment, if sufficient description was given to ascertain where the land was situated. This did not dispense with a good description of the land proceeded against.

And Section 13 declared that no *informality or irregularity* in holding the meetings, or in the description or valuation of the lands, or in the names of the owners, or the number of acres therein, should be a valid defense in the suit provided for. This merely dispensed with objections for errors of form in the procedure. It did not touch defects of substance.

The original act provided that any person having an interest in the land sold, might redeem it within one year from the date of the sale, by paying the tax, cost, penalty, and a further penalty of ten per centum, as in other Chancery proceedings, except that such sale should be made for cash. (Section 11.)

But this provision was omitted in No. 71 of the Acts of 1895, and the result as held in Banks v. The Directors of the St. Francis Levee District, 66 Ark. 490, and in Gavin v. Ashworth, 4 Ark. Law Rep. 118, 91 S. W. Rep. 303, was that in sales made after the passage of the latter act, there was no redemption provided for by the statute.

The act last referred to, No. 71 of the Acts of 1895, substituted another section for Section 11 of the Acts of 1893, completely displacing that section, but in most respects re-enacting its provisions. The sales involved here were made after that act took effect.

In the section substituted, it was provided that the suit to be instituted to collect the levee taxes, should be *by Chancery proceedings,* in the court having *Chancery jurisdiction,* and that the court should give judgment against the persons claiming to be the owners of the lands, if known to the Board of Directors, for the amount of such assessments, and a penalty of 25 per cent., and interest from the end of the thirty days allowed for collection, at the rate of 6 per cent. per annum, and all the costs of the procedings.

The same section also provided that the proceeding and judgment should be in the nature of proceedings *in rem,* and that it should be immaterial that the ownership of the land might be incorrectly alleged in the proceedings, but the judgment should be enforced only against the land, and not against any other property or estate of the defendant. All the lands in any county, it was provided, might be included in one suit, and *all* delinquent owners of such lands, including those unknown to the Board of Directors, might be included in one suit, as defendants.

That section also provided that notice of the pending of the suit should be given as against *non-residents of the county,* and unknown owners, respectively, when such suit might be pending, by publication weekly, for four weeks prior to the day of the term of court on which final judgment might be entered for the sale of the land, in some newspaper published in the county where the suit was pending, and then prescribed the form of the notice, including *the style of the case* in which it was to be given.

That notice begun by stating that the "following named persons and corporations and all others having or claiming an interest in any of the following described lands, are notified that a suit is pending," in a designated court, to enforce the collection of certain levee taxes "on the subjoined list of lands, each supposed owners' lands being set opposite his, or her, or its name, respectively, together with the amounts severally due from each, to-wit:" Then the list of the lands, and the names of the supposed owners, with a descriptive list of the delinquent lands, and the amounts due thereon, respectively, were directed by the statute to follow.

The same section declared that as against any defendant who resided in the county where the suit was, and who appeared by the record of deeds in the county to be the owner of any of the lands proceded against, notice of the pending suit should be given by the service of personal summons of the court.

That section also declared that *after the notice prescribed had been given properly*, as prescribed, and no answers had been filed, or if answers were filed, and the cause decided for the plaintiff, that the court should decree the relief prayed in the complaint, and should direct the commissioner appointed to sell the lands described in the decree.

The section concluded by declaring: "Actual service of summons shall be had where the defendant is in the county, or where there is an occupant upon the land."

Acts of 1895, pp. 88-92.

This act also amended Section 13, of the original act, already stated, and declared that the suit should be conducted *in accordance* with the practice and proceedings *of Chancery Courts* in Arkansas, except that neither attorneys nor guardians, *ad litem*, nor any provision of Section 5877 of Sandel's & Hill's Digest of the Statutes of

Arkansas, should be required; and except that said suit should be disposed of on oral testimony, as in ordinary suits at law.

Acts of 1895, p. 92.

Under the legislation, as stated, a complaint was filed in the Chancery Court of Crittenden County, on December 21, 1897. The style of the case in the caption was "Board of Directors of the St. Francis Levee District, Plaintiff, v. Memphis Land & Timber Company, John Adams," and more than two hundred and fifty other persons or corporations, as defendants. (Record, pp. 9-14.)

A number of the defendants were alleged to be non-residents of Crittenden County, Arkansas, but whether they resided outside the State of Arkansas or not, the complaint did not state. (Record, p. 10.)

A. B. Ballard was named among those who resided outside Crittenden County, but Josephine W. Ballard was not named anywhere in the complaint. After the statement of the names of the defendants, the complaint begun: "The plaintiff, the St. Francis Levee District, states and represents to the court," etc. The complaint was not signed nor verified by the plaintiff, nor by any attorney for it, as required by the statute (Sandels & Hill's Digest, Sec. 5744; Kirby's Digest, Sec. 6120), but there was an affidavit purporting to have been made by Williams, stating that he was the attorney for the plaintiff, and that the chief officers of the St. Francis Levee District were absent from Crittenden County, and that the facts stated in the complaint were true. (Record, pp. 13-14.)

After the names of the defendants, the complaint referred to the act creating the Levee District, and the amendment to it (Record, p. 11), and stated that "the following lands lying and being situated in said Levee District, said county and State, and belonging to said

defendants named in the caption of this complaint, a list of which is hereto attached, and asked to be taken as a part thereof." etc. The list attached to the complaint contained the names of a great many persons and corporations and all the lands in Crittenden County, by what purported to be descriptions, on which the levee taxes had been assessed, and which had not been paid. Only the portions of the record having reference to the lands of A. B. Ballard and Josephine W. Ballard, and Thomas H. Allen, who also was making a contest as to other lands at the same time, are copied in this record.

(Record, pp. 11-12.)

In the list attached to the complaint, and nowhere else in the complaint, the particular lands involved in this suit were mentioned. The particular descriptions given of them are copied in the brief, and appear in the record, page 12. In the list it was simply stated that the lands described were assessed to A. B. Ballard. In the complaint (Record, p. 13), referring to all the lands embraced in the list attached to it, it was averred that they were assessed for the year 1894, and were likewise "assessed for at the same rate for 1894, 1895, 1896 and 1897." No distinction was made with reference to the assessments for the different years, nor was it stated when or how they were made. As shown by the list attached to the complaint (Record, p. 12) on two tracts sued and involved here, the taxes were claimed to be due for 1895, 1896 and 1897. And on the third tract, for 1895 and 1896 only.

No taxes were claimed to be due on those lands for the year 1894. After referring to the list of the lands attached to the complaint, the complaint simply stated that they "were duly assessed for taxes for levee purposes in the name of said defendants, whose names are written opposite to said tracts of land respectively, * * * and the taxes thereon being duly extended on the

tax books of said Levee District were duly returned by said collector, and now remain on said tax books as delinquent—the taxes on the said several tracts of land being as stated in the list hereinbefore referred to as a part hereof." (Record, p. 12.)

Then, after stating what had been done in the way of authorizing the levy of the levee taxes (Record, p. 12), the complaint alleged that all the lands in the District were duly assessed for taxation "as per the said increased value or betterment thereof by the assessors elected under said acts, and in accordance with the terms and requirements thereof, and the benefits or increased value as aforesaid, of the lands herein described, and referred to as belonging to said defendants, were assessed at the value of $2.00 for each and every acre thereof."

Nothing further was said in the complaint as to the method of making the assessments, nor what the increased value or betterment of any particular tract of land was, nor who the owner of any particular tract was, or who had an interest therein. (Record, pp. 12-13.)

After the statement with reference to the assesments of the levee taxes, the complaint alleged that the Board of Levee Directors elected a collector for Crittenden County —R. W. Barton—and that the said Barton, as collector, "on the first Monday in October, 1894, 1895, 1896 and 1897, proceeded to collect said taxes due on the lands of said Crittenden County." Then it was stated that "on the first Monday of October, 1894, said R. W. Barton, as collector, proceeded to collect said taxes due on said lands for 1894, within said Levee District, and that within the time limited by said statutes for the collection of said taxes, no taxes were paid by said defendants, nor by any one for them on their lands, as aforesaid, and all of said taxes on said lands, of said defendants here-

inbefore named in the caption of this complaint, are yet wholly unpaid and delinquent." (Record, p. 13.)

Nothing further was said as to the levee taxes, or what was done towards collecting them for the years 1895, 1896 and 1897. The lands in controversy were not sued for any taxes for the year 1894, and one tract was not sued for any taxes for the year 1897. (Record, p. 12.)

The complaint claimed a lien under the statute "on said lands of said defendants for said unpaid taxes, together with interest thereon at the rate of 6 per cent. per annum from the first Monday in November, * * * 1894, 1895, 1896 and 1897, until paid, and the penalty of 25 per cent. as provided and imposed by said statute for non-payment of said taxes, which taxes, without interest or penalty, amounted to the aggregate sum of $———." (Record, p. 13.)

The prayer was that "judgment be given plaintiff against said defendants for said aggregate amount of taxes, interest, penalty, and the costs of this proceeding, and that such judgment be decreed to be a first lien on said lands of said defendants above named, and that for the purpose of enforcing said decree said lands be condemned," etc. (Record, p. 13.)

The concluding part of the prayer to the complaint was "that a *warning order* issue for the non-resident defendants herein named, requiring them to answer the complaint of the plaintiff *at the next January term* of this court, and that summons issue as to the other named defendants." (Record, p. 13.)

No notice as to the non-resident defendants appears in the record, and hence none was given.

The Chancery Court of Crittenden County, in 1898, begun on the third Monday of January, 1898, which was the 17th day of that month.

Acts of Arkansas, Second Extra Session, 1897, No. 37, p. 93.

Nothing appears in the record to show why the Chancery Court of Crittenden County did not convene on the third Monday of January, 1898 (Record, p. 8), nor why it was in session on the 14th day of February, 1898 (Record, p. 14), which was about ten days after the termination by law of the January term, 1898, of that court.

On February 14, 1898, as the record shows (Record, p. 14-19), the cause came on to be heard, and the plaintiff, the Board of Directors of the St. Francis Levee District, also came by its attorney. The case was styled similarly to the style in the complaint.

It was first recited in the decree that the defendants, B. L. Armstrong and a great many others, who were named, but not including either A. B. Ballard or Josephine W. Ballard, had been duly served with summons in the case, but made default, and that other defendants (naming the Memphis National Bank, and a great many others), and among them A. B. Ballard, but not Josephine W. Ballard, "were constructively summoned by publication in a newspaper published in Crittenden County, Ark. (but not naming the newspaper), weekly for four weeks before this day, proof of which has been previously filed herein, and all of the above named defendants, except A. H. Chatfield, the Memphis Land & Timber Company, and the Arkansas Land Company, having failed to plead, answer, or demur to the complaint of the plaintiff, the court, on motion of the attorney for the plaintiff, awards a decree *pro confesso* as to them, in favor of the plaintiffs for the amount of the taxes, interest, penalty and costs due for their said lands." (Record, pp. 15-16.)

The decree proceeds: "Thereupon this cause was submitted to the court on the complaint of the plaintiff, and the answer of the said A. H. Chatfield, trustee, the Memphis Land & Timber Company, and the Arkansas Land Company, and the documentary evidence, the records

of the Board of Directors of the St. Francis Levee District, the records of the Board of Assessors of said Levee District, the assessment books, and the tax books for said Levee District for Crittenden County, the exhibits to the complaint, and the oral evidence of Hugh R. McVeigh, secretary of the Board of Directors of said district; W. H. Newsome, Dr. R. W. Barton, collector for Crittenden County, and Arthur Vance, assessor of said county, for said Levee District." (Record, p. 16.)

The court then found a state of facts (Record, pp. 16-17), substantially as set out in the complaint, but in some respects going beyond the allegations of the complaint, having reference generally to the lands and defendants proceeded against in the suit, but nothing special as to A. B. Ballard or Josephine W. Ballard, or their lands. They were not named anywhere in that part of the decree.

There was then a general decree that the plaintiff—the Board of Directors of the St. Francis Levee District—recover from the defendants severally, to be enforced wholly against "said lands" the amount of the taxes, interest, penalty and costs assessed, levied and extended against the lands belonging to each of said defendants, respectively, for the years 1893, 1894, 1895, 1896 and 1897, according to a list and tabulated statement copied in the decree. (Record, pp. 17-18.)

The statement as to the lands of A. B. Ballard and Josephine W. Ballard is copied in the brief.

There was a further decree that the total amount set opposite each several tract in the list of lands, was the amount of the taxes, interest, penalty and costs due thereon to the plaintiff, and that the same be a lien on each of said tracts, respectively.

The defendants, or any person for them claiming the lands, or any interest in them, were then given permission before the sale to pay to the clerk of the court the amount

of the taxes, interest, penalty and costs set opposite each tract of land in the statement, and the costs afterwards to accrue, as provided for in the decree, up to the time of the payment, and the clerk was directed to give a receipt for the payment, and note the fact on the record, and it was declared that the payment should discharge the decree against the tract of land paid on. (Record, pp. 18-19.)

The clerk of the court was then appointed commissioner and directed to sell the lands on which the lien had not been discharged as required, to the highest bidder for cash, after first having given notice of the sale by publication weekly for two weeks in some newspaper published either in Crittenden County, or some adjoining county, and if all the lands were not sold on the date advertised, the sale was directed to continue from day to day until completed. (Record, p. 19.)

The court then directed the clerk as commissioner to execute a deed of conveyance to the purchaser for the lands sold, and gave him a fee for doing so of $1.00, to be paid by the purchaser. If the land was not purchased by some other party, then the commissioner was directed to bid it off in the name of the Board of Directors of the St. Francis Levee District, for the whole amount due on it, and to execute a deed of conveyance to that district. The decree then prescribed the fees for the commissioner and printer, as follows:

(1) For furnishing the printer a list of lands to be advertised, five (5) cents per tract.

(2) For attending and making and reporting the sale, twenty-five (25) cents per tract.

(3) To the printer for publishing the notice, fifty (50) cents per tract.

It declared that those fees should be taxed as costs against each several tract of land, to be paid by the pur-

chaser, or the persons discharging the lien before the sale, and directed the comimssioner to report his proceedings to the court at the next term. (Record, p. 19.)

The commissioner filed his report of sale on July 20, 1898, showing all the sales made under the decree on the 13th and 14th days of June, 1898, and that A. Hackler and C. W. Hunter, respectively, became the purchasers of the tracts of land involved in this suit. (Record, pp. 21-22.)

That portion of the report having reference to the lands involved here, is copied in the brief.

The court entered a decree confirming the sales made at the July term, 1898, of the court. (Record, pp. 21-23.)

At the January term, 1899, of the court (Record, p. 25), the commissioner appeared in court and acknowledged the deed to A. Hackler for the tract of land purchased by her, and also the deed to C. W. Hunter for the lands purchased by him.

The substance of these orders as to the lands in controversy is copied in the brief.

At the September term, 1899, A. B. Ballard and Josephine W. Ballard obtained leave to file in the suit, their answer, motion, petition and bill of review, and to be made parties to the suit, with reference to the lands involved here, and the court ordered that their pleading be filed, and they were made defendants and parties to the suit for the purposes set out in such pleading. (Record, p. 26.)

This pleading is in the record, pp. 27-37, and in substance set out the title of A. B. Ballard and Josephine W. Ballard to the lands in controversy here, referring to the deeds by which they held them, of record in the recorder's office of Crittenden County.

It stated that they had not been made parties to the suit, and had not appeared in it, and had no knowledge

or notice of it, until after the sale of their lands. They were citizens of Georgia and Florida, respectively, and resided in those States, respectively, and outside of Arkansas, and had no knowledge or notice of the levy of the levee taxes, or the legislation authorizing them.

They denied that they had been brought before the court in the suit by any warning order or other publication, or any constructive service of process in the suit. They alleged that no affidavit had been filed in the clerk's office, at or after the commencement of the suit, stating any fact authorizing the clerk of the court to make a warning order, or to give notice to them by publication of the suit.

The clerk of the court did not make on the complaint, or otherwise any warning order, or order for notice, requiring them to appear in the suit. No publication of any warning order or notice was ever made in the suit as to them. No proof was ever made in the suit of the publication of any warning order, or notice to them. They denied that they, or their lands, had ever been brought before the court, or within its jurisdiction in the suit, or that the court had the power to decree a sale of their lands, or pass the title to them. They stated that the complaint had not stated that they were the owners of the lands, or claimed to be the owners. That their titles were of record in the office of the commissioner of State lands, and also in the office of the recorder of Crittenden County, and that the ownership of their lands was known to the Board of Directors of the St. Francis Levee District, and that the complaint had not alleged that the ownership of their lands was unknown to the plaintiff, or that the owners of the same were unknown, nor did any notice published ever state that the owners of their lands were unknown to the plaintiffs.

They then stated that no notice of the pendency of the suit as against non-residents of Crittenden County, and unknown owners with reference to their lands, when the

suit was pending, had ever been given by publication weekly for four weeks prior to the first day of a term of the court, or prior to the day of a term on which the final judgment for the sale of their lands was entered, and that the judgment or decree was rendered without notice to them, actual or constructive, and therefore, the same, and the proceedings under it were void.

After stating the decree as made (Record, p. 30), they stated that they had no title to or interest in the north half of the northwest quarter of Section 32, nor in the southeast quarter of Section 32; but their land was the southwast quarter of Section 32, and the south half of the northwest quarter of Section 32, and those two tracts had been taxed and charged jointly along with the other tracts embraced in the west half of Section 32, and the southeast quarter of Section 32, in which they had no interest, and for an amount charged for the taxes due on the whole 480 acres, when they owned only 240 acres of the said tracts, and their lands were liable only for the taxes properly chargeable on them. (Record, p. 31.)

The decree of sale, and sale were claimed to be void because of those facts. Objection was then made to the portion of the decree (Record, p. 31) fixing costs and fees to be paid out of the sales of their lands, and it was claimed that the court had no jurisdiction to make such decrees, and that the sales for the fees and costs so charged, and directed to be paid, were void.

The pleading stated, that as soon as A. B. Ballard and Josephine W. Ballard learned of the sales to Hackler and Hunter, to-wit, about March 10, 1899, they tendered to each of them the sums they had bid and paid out for the lands, and such additional sums as they were entitled to, or considered themselves entitled to, in order to allow redemption, and each Hunter and Hackler refused to permit redemption, or to name any sum they were willing to receive in order to perfect redemption. They brought into court, as the pleading alleged, the money,

and offered to deposit it as the court might order to complete the redemption. (Record, p. 32.)

The fact of the tender, as alleged is agreed to. (Record, pp. 40-41.)

The pleading then denied in words the recital in the decree of February 14, 1898, under which the sale was made, that A. B. Ballard or Josephine W. Ballard, or either of them, by name, or by description as unknown owners of the lands in controversy, had been severally, constructively summoned to appear in the suit by publication in a newspaper published in Crittenden County, and that proof of such fact had been previously filed in the suit, and stated that the statement was entirely untrue, and asked leave to contest the truth of it. (Record, pp. 32-33.)

The pleading then stated further, that nothing in the complaint, when taken as confessed or as the decree recited it, authorized or justified the decree, or the sale under it of their lands as against A. B. Ballard and Josephine W. Ballard. No testimony was introduced as to their liability, or the liability of their lands for the sums decreed against them. The court had no authority without evidence, to award a decree *pro confesso* against them, or as to their lands in favor of the plaintiff for the amounts of the taxes, interest, penalty and costs claimed to be due, and decreed to be due. The decree of sale was claimed to be void for those reasons. (Record, p. 33.)

Various provisions of the Acts of Arkansas, No. 19, of the year 1893, and No. 71 of the year 1895, were pointed out as invalid, as against A. B. Ballard and Josephine W. Ballard, with respect to the matters involved in this suit (Record, pp. 33-35), because in violation of designated provisions of the Constitution of the State of Arkansas, and also because they violate Clause 1, Section 2, Article 4 of the Constitution of the United States, and the provisions of the 14th amendment to that Constitution, declaring that no State shall make or

enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

The prayer of the pleading was that A. B. Ballard and Josephine W. Ballard be allowed the benefit of certain statutes of the State of Arkansas applicable to cases of relief against judgments or decrees, specially referred to, and which are more particularly noticed in the brief; and further that their pleading be taken as a bill of review, if necessary to their relief in the suit. (Record, p. 35.)

There was then the prayer that all the parties to the suit, in which the decree had been rendered, and the proceedings had, including the Board of Directors of the St. Francis Levee District, and Hackler and Hunter, the purchasers, be treated as defendants to the pleading of A. B. Ballard and Josephine W. Ballard, for all the purposes of the relief prayed. Or if necessary, that the purchasers Hackler and Hunter be brought before the court by the service of summons, or by proper publication and made defendants. (Record, p. 36.)

It was then prayed that the decree of February 14, 1898, and all subsequent decrees affecting A. B. Ballard and Josephine W. Ballard, or their lands, be reviewed, reversed, vacated and set aside. That the decree confirming the sales of their lands to Hackler and Hunter, respectively, be vacated, set aside and held for naught. That the report of sale be also set aside, vacated and canceled; and the sales of their lands to Hunter and Hackler be vacated, set aside, and held for naught. That any deed made by the commissioner to Hunter and Hackler, respectively, or any one claiming under them, be also vacated, canceled and held for naught. That the title of A. B. Ballard and Josephine W. Ballard to the tracts of land, be cleared and quieted, and confirmed and

declared to be complete and perfect against the decrees and proceedings in the suit, and all the parties thereto. That they be permitted to pay the taxes legally and justly due on their lands, including penalties, interest and costs. And they alleged that they brought into court and offered to deposit the money required, or necessary for that purpose. If proper, and according to the course of the law, they prayed that they might be allowed to redeem the lands from Hackler and Hunter, respectively, upon paying them the sums of money to which they were entitled, in order to perfect redemption. And they alleged that they brought that money into court. If more appropriate according to law, then they asked to be allowed to increase the bids of Hunter and Hackler, respectively, for the lands they purchased, and they offered to increase the bids by 50 per cent. upon each bid; and alleged that they brought the money into court for that purpose.

They also prayed the proper judgment against the adverse parties for costs, and for general relief. (Record, pp. 36-37.)

No formal answer or plea was filed by the purchasers, Hunter and Hackler, or any one to the pleading filed by A. B. Ballard and Josephine W. Ballard, but there was and agreement that without any plea, the matter presented by the pleading of A. B. Ballard and Josephine W. Ballard should be heard as an agreed case, upon the Agreed Statement of Facts theretofore filed in the cause, and the evidence referred to therein; and that agreement (with a mistake of one word) was put of record in an order in the Minute Book. (Record, pp. 37-38.)

The agreed statement of facts is in the Record, pp. 38-41. That agreement stated that for the purposes of the trial of the issue between A. B. Ballard and Josephine W. Ballard, of the one part, and A. Hackler and C. W. Hunter on the other, arising upon the answer and motion

of A. B. Ballard and Josephine W. Ballard, and the answers or replies thereto of Hackler and Hunter, the state of facts set out was agreed to, and that that agreement was to have the effect of proof duly made upon the issues for the decision of the controversy.

After agreeing to the muniments of title of A. B. Ballard and Josephine W. Ballard to the land in controversy, and that they, respectively, were citizens and residents of the States of Georgia and Florida, and neither one was within the State of Arkansas when the suit was begun, but they had each remained citizens and residents of those States, resepctively, since that date; it was then agreed further that each one would testify that they had no knowledge of the suit or its pendency, or that the taxes for levee purposes had been levied upon their lands before the date of the sale of their lands in the suit, or the purchases thereof by Hunter and Hackler, or even that the laws on that subject had been enacted. (Record, pp. 39-40.)

It was further agreed that the record in this suit, including the complaint and any amendment, warning order or order of publication, proof of publication, any summons, or other process issued in the suit, and the returns of the officers thereon, and the publication of any warning order, or notice made in the "Marion Reform," a newspaper printed in Crittenden County, and the pleadings and proceedings in the suit, including all the orders, judgments and decrees, and any and all reports of sale and deeds made by the commissioner, having reference to the lands of A. B. Ballard and Josephine W. Ballard, or copies, where the originals could not be produced, might be used and read in evidence by either party for all the proper purposes of the controversy, subject only to objections for irrelevancy and incompetency. (Record, p. 40.)

The certificate of the clerk, authenticating the transcript sent from the Crittenden Chancery Court to the

Supreme Court of Arkansas, shows that all the records and other evidence used, are copied in the present transcript. (Record, pp. 78-79.)

The other matters in the agreed state of facts have already been stated.

The deed to Hackler is in the record, page 41; and the deed to Hunter is in the record, pages 69-71.

The cause was heard in the Crittenden Chancery Court on February 28th, 1902, upon the pleading of A. B. Ballard and Josephine W. Ballard, and the agreement of the parties in writing, and the record and proceedings referred to and made a part of the agreement, and the court decreed that the relief prayed by A. B. Ballard and Josephine W. Ballard be denied, and that their answer, motion, petition and original complaint be dismissed.

They excepted to the decree and prayed an appeal to the Supreme Court of Arkansas, which was granted. (Record, pp. 72-73.)

The case was heard in the Supreme Court of Arkansas on February 11th, 1905, on the transcript of the record from the Chancery Court of Crittenden County, and the court found that there was no error in the decree of that court, and affirmed the decree, with costs, and ordered that the appellees recover of the appellants all the costs of the cause. (Record, p. 80.)

The opinion of the Supreme Court of Arkansas is in the record, pages 81-83.

The decree was amended on March 4th, 1905, so as to certify that Federal questions had been presented and argued, and were considered and determined by the court adversely to A. B. Ballard and Josephine W. Ballard. (Record, p. 84.)

A writ of error from this court was sued out on August 4th, 1905, and the necessary bond was given, and the writ of error was allowed by the Chief Justice of the Supreme

Court of Arkansas on the 9th day of September, 1905, and service of the citation in error was acknowledged by some of the parties, and the citation was served on the others in August and September, 1905. (Record, pp. 1-4.)

The assignment of errors was filed in the Supreme Court of Arkansas, as required by the rule, and is a part of the transcript of the record, pages 5-8.

A good deal of the present record need not be considered on the present writ of error. Portions of it relate exclusively to the controversy between Thomas H. Allen, or his assigns, and Chas. W. Hunter, and others, and that case is not here for decision. It was decided in favor of Thos. H. Allen, or his assigns (record, pp. 73-74), and no appeal to the Supreme Court of Arkansas was ever perfected, by Hunter or others.

Under the statement just made, the record, pages 44 to 69, may be altogether omitted in considering this case, as that portion relates exclusively to the controversy just mentioned.

BRIEF FOR A. B. BALLARD AND JOSEPHINE W. BALLARD, PLAINTIFFS IN ERROR.

I.

We will present the first three assignments of error together. Substantially they are, that the sales to Hunter were void, because:

1. The lands belonging to A. B. Ballard and Josephine W. Ballard were not properly described in the complaint, or sued for the taxes they were afterwards sold for.

2. The two tracts of land belonging to A. B. Ballard and Josephine W. Ballard, viz., the southwest quarter of Section 32, and the south half of the northwest quarter of Section 32, were sold along with and as a part of the west half of Section 32, when A. B. Ballard and Josephine

W. Ballard did not own or claim the north half of the northwest quarter of that section.

3. The two tracts of land of A. B. Ballard and Josephine W. Ballard were sold as a whole under the description: the west half of Section 32, and as a part of that half section, and for the taxes on the whole of that west half, when A. B. Ballard and Josephine W. Ballard did not own, and were not chargeable with, the taxes on the north half of the northwest quarter of Section 32, which was a portion of the west half of that section.

It is claimed the sales were void because of the facts just stated.

Our positions are that the titles claimed by the purchasers—Hunter and Hackler—to the lands in controversy, which it is conceded (Record, p. 89) belonged to A. B. Ballard and Josephine W. Ballard, but for their purchases, depend entirely on a strict compliance with the statutes referred to, Act No. 19 of the year 1893, and Act No. 71 of the year 1895, in the assessment, the levy of the taxes, and the conduct of the suit, and cannot be maintained, except by showing affirmatively, not only a substantial compliance with their requirements, but an exact compliance, from the inception of the undertaking to have the levee taxes voted by the land owners, until the conclusion of the sales under the decrees in the suit, authorized to be brought, to enforce the collection of them.

As we have seen, not only were the lands by the Act of 1893 (Section 7), to be assessed in convenient subdivisions as surveyed by the United States, but the assessment books were required to show the names and residences of the owners, and the mortgages on the lands, and a description of them, and, approximately, the number of acres cleared. The collector was to be furnished the list of the assessments made (Acts of 1893, No. 19, Sec. 11, p. 31, and Acts of 1895, No. 71, Sec. 1, p. 88), and if they

were not paid the Board of Directors was required to enforce the collection of the whole by Chancery proceedings, and the court was required to give judgment against the persons claiming to be the owners of such lands, if known to said board, for the amount of such assessments, and the penalty and interest, and all the costs of the proceedings. It was only in case the ownership of the lands was not known to the board that any lands could be proceeded against without giving the names and residences of the owners, and the other particulars required to be in the assessments, and then the unknown owners of any particular lands (Acts of 1895, No. 71, p. 89), were required to be included as defendants, and the notice provided for was to be as against unknown owners when the suit was pending. And in order to protect unknown owners the act (Acts of 1895, No. 71, p. 90) specially provided that "where the owners were unknown that fact should be so stated in the published notice." This meant, of course, that the particular tract of land, whose owner was unknown, should be assessed just as other lands were assessed, omitting only the name and residence of the owner, and the notice should state he was unknown, and in that case the act declared (Acts of 1895, No. 71, pp. 89-90), "such lands might be proceeded against as above set forth for the collection of said assessments, penalties, interest and costs due thereon, as being owned by unknown owners."

The notice to be given "as against non-residents of the county" (Acts of 1895, No. 71, p. 89) was required by the act to contain "a list of the supposed owners, with a descriptive list of said delinquent lands, and amounts due thereon, respectively, as aforesaid," and then the notice was to conclude by warning those it was directed to that "judgment final would be entered, directing the sale of said lands for the purpose of collecting said delinquent levee taxes, together with the payment of interest, penalty *and costs allowed by law.*"

Acts of 1895, No. 71, p. 90.

The several tracts of land, and the respective owners of them, were recognized in the act (Acts of 1895, No. 71, p. 90) to be different and distinct by the provision that continuances might be granted for good cause shown "as to a part of said land, or defendants, without affecting the duty of the court to dispose finally of the others, as to whom no such continuances might be granted."

The court was required to see that in all cases "notice had been properly given as aforesaid." And then, where the case was made out, was by its decree to "grant the relief as prayed in the complaint," and direct the commissioner to sell the lands "described in the decree" for the sum of "the taxes due, together with the interest, costs and penalty" *due on each tract*, as described and sold, and if no third party would bid such sum, then the commissioner was to bid *such particular tract* off "in the name of the said Board of Directors of the St. Francis Levee District, bidding therefor the whole amount due as aforesaid."

Acts of 1895, No. 71, p. 91.

And finally, to protect every owner as to his land, as far as practicable, it was provided (Acts of 1895, No. 71, p. 89), "that such judgment shall be enforced wholly against said land, and not against any other property or estate of said defendant."

And further, the act declared (Acts of 1895, No. 71, p. 89), "said proceedings and judgment shall be *in the nature of* proceedings *in rem.*"

By Section 12 of the Act of 1893 (Acts of 1893, No. 19, p. 32), the rights of infants and insane persons, having no guardian or curator, as they then existed, "to appear and except to said proceedings within twelve months after their disabilities were removed," were preserved, and the Act of 1895 (Acts of 1895, No. 71, p. 91) saved the same rights. And, besides, the last act (Acts of 1895, No. 71, pp. 91-92) declared that the owner of the lands

might file his petition in the court at any time within three years after the rendition of the final decree, alleging the payment of the taxes on such lands, and upon establishing that fact, the court should vacate and set aside the decree.

By the statutes applicable to assessments for ordinary taxation, the lands of each owner are to be listed in appropriate columns opposite his name, by the description of each tract by section, or the largest subdivision, of which the same is capable, designating the number of the section, and the part thereof, and the Congressional township, or survey, and the value of each tract, determined by the assessor. And in all cases where practicable, and the land is owned by one person, or one or more persons jointly, the description, both on the tax books and delinquent lists, shall be in tracts of not less than 160 acres. And the delinquent list to be filed each year with the clerk of the County Court by the collector must describe the lands on which taxes are delinquent, as the same are described on the tax books.

And then the clerk of the County Court, after making the necessary corrections, must publish the list of delinquent lands, as thus made, with a notice of sale by the collector, on the 2d Monday of June then next, and before the day of sale record the list and notice of sale in a book kept for the purpose, and attach a certificate stating the facts at the foot, which becomes the sole evidence of the facts.

Kirby's Digest of the Statutes of Arkansas, Secs. 6976, 7024, 7083, and 7085-7086.

Compliance with the requirements of these statutes is essential to the validity of sales for ordinary taxes.

The courts treat them as mandatory—

Blackwell on Tax Titles (2d. Edn.), Ch. 5. p. 106, etc.

Black on Tax Titles (1st Edn.), Ch. 3, Secs. 27, etc., 34, etc.

Martin v. Allard, 55 Ark. 218.
Cooper v. Freeman Lumber Co., 61 Ark. 42, etc.
Logan v. Land Co., 68 Ark. 248.
Hunt v. Gardner, 74 Ark. 583.
Bonner v. Board of Directors of St. Francis Levee District, — Ark. —, and 92 S. W. Rep. 1124.
Martin v. Barbour, 34 Fed. Rep. 701, and 140 U. S. 634.
Gregory v. Bartlett, 55 Ark. 30.
Taylor v. The State, 65 Ark. 595.
French v. Edwards, 13 Wallace 511, etc.
Lyon v. Alley, 130 U. S. 184, etc.
Cooley on Taxation, Ch. 12, p. 258, etc. (1st Edn.).
Gaines v. Stiles, 14 Peters, 322, 331, etc.
Redfork Levee District v. St. L., I. M. & S. Ry. Co. (Ark.), 96 S. W. Rep. 117.

The two acts of the General Assembly, No. 19 of the Acts of 1893, Act of the 15th of February, 1893, Acts of 1893, p. 24, and Act No. 71 of the Acts of 1895, of April 2d, 1895, Acts of 1895, p. 88, and the other acts on the subject, show very clearly that it was the purpose of the General Assembly to tax each tract of land subject to taxation, not only according to the subdivisions in the public surveys made by the United States of the public lands, but also with reference to the ownership of each tract of land; that is to say, to tax each tract of land belonging to distinct owners separately, with reference to the ownership, as well as with respect to the subdivision, so that the owner of each tract might pay the taxes on it, and relieve it, without being obliged to pay the taxes levied on other tracts of land belonging to some other owner.

The title papers of A. B. Ballard and Josephine W. Ballard, as is agreed in this record, were of record in the recorder's office of Crittenden County, and they showed that A. B. Ballard and Josephine W. Ballard owned, and that they claimed to own, only the southwest quarter of Section 32, and the south half of the northwest quarter of Section 32, and the northeast quarter of Section 31, town-

ship 4 north, range 7 east. The first of these tracts contained 160 acres, the second 80 acres, and the third 160 acres.

In the complaint, Record page 12, the land proceeded against was described as:

"Township 4 north, Range 7 east.

West half southeast quarter, Section 32, town 4 north, range 7 east, 480 acres, assessed to A. B. Ballard—

Taxes for 1895.....$19.20
Taxes for 1896..... 19.20
Taxes for 1897..... 19.20

West half northeast quarter, Section 32, township 4 north, range 7 east, 80 acres, assessed to A. B. Ballard—

Taxes for 1895.....$ 3.20
Taxes for 1896..... 3.20
Taxes for 1897..... 3.20

Northeast quarter Section 31, township 4 north, range 7 east, 160 acres, assessed to A. B. Ballard—

Taxes for 1895.....$ 6.40
Taxes for 1896..... 6.40 "

In the decree of sale of the 14th of February, 1898, fixing the lien on the land, and ordering the sale of it for the payment of the levee taxes found to be due, the land was described as:

"Township 4 north, Range 7 east.

West half of southeast quarter, Section 32, township 4 north, range 7 east, 480 acres, assessed to A. B. Ballard—

Taxes for 1895.....$19.20
Taxes for 1896..... 19.20
Taxes for 1897..... 19.20

West half of northeast quarter, Section 32, township 4 north, range 7 east, 80 acres, assessed to A. B. Ballard—

Taxes for 1895.....$ 3.20
Taxes for 1896..... 3.20
Taxes for 1897..... 3.20

Northeast quarter Section 31, township 4 north, range 7 east, 160 acres, Assessed to A. B. Ballard—

Taxes for 1895.....$ 6.40
Taxes for 1896..... 6.40 "
(Record, p. 18.)

When the commissioner came to make the sale, or, at least, when he came to report the sale to the court, he reported that he had sold land as follows:

"A. B. Ballard, owner, northeast quarter Section 31, township 4 north, range 7 east, 160 acres, valued at $320.00, for the taxes for the years 1896 and 1897: Taxes, $12.80; interest, 58 cents; penalty, $3.20; costs, 95 cents; total taxes, $17.53. Sold to A. Hackler for $18.50.

Township 4 north, Range 7 east.

A. B. Ballard owner, west half and southeast quarter Section 32, 480 acres, valued at $690.00: For the taxes for the years 1894, 1895, 1896 and 1897; interest, $4.30; penalty, $14.40; costs, 95 cents; total taxes, $77.27. Sold to C. W. Hunter for $78.25.

A. B. Ballard owner, west half of northeast quarter of Section 32, 80 acres, valued at $160.00: Taxes for the years 1894, 1895, 1896, 1897; interest, 72 cents; penalty, $2.40; costs, 95 cents; total taxes, $13.67. Sold to C. W. Hunter for $14.50." (Record p. 22.)

When he acknowledged the deed to Hackler, the land conveyed was described as the "Northeast quarter Section 31, township 4 north, range 7 east, 160 acres." (Record, p. 25, and Record, p. 43.)

When he acknowledged the deed to Hunter, the land was described: "West half and southeast quarter, Section 32, township 4 north, range 7 east, 480 acres; west half northeast quarter, Section 32, township 4 north, range 7 east, 80 acres." (Record, p. 26.)

The deed to Hackler describes the land as "northeast quarter Section 31, township 4 north, range 7 east, 160 acres." (Record, p. 41.)

The deed to Hunter describes the land, "West half and southeast quarter, Section 32, township 4 north, range 7 east; west half northeast quarter, Section 32, township 4 north, range 7 east." (Record, p. 70.)

In the pleadings filed by A. B. Ballard and Josephine W. Ballard, they attack the sales by the commissioner to Hunter of the southwest quarter of Section 32, and the south half of the northwest quarter of Section 32, township 4 north, range 7 east, because those sales had been made without any suit or decree against those tracts of land authorizing the sale, and because they had not been separately sold by the proper descriptions, but had been illegally sold as a part of the west half of Section 32. In substance the objection was (1) that these particular tracts of land had not been sued, or decreed to be sold; and (2) that the whole west half of Section 32 had been sold as one tract of land, for one sum of money, when A. B. Ballard and Josephine W. Ballard owned only the southwest quarter of Section 32, and the south half of the northwest quarter of Section 32, and they had no title, and set up no claim to the north half of the northwest quarter of Section 32. The sale could not properly embrace any land not sued for the taxes, and not decreed to be sold, and the only land Hunter bought which had been sued for the taxes, as shown by the complaint, or decreed to be sold, as shown by the decree, was the west half of the southeast quarter, and the west half of the northeast quarter of Section 32, township 4 north, range 7 east, and A. B. Ballard and Josephine W. Ballard did not own, or claim any title to either of the tracts so described, and did not set up any claim in the pleadings they filed to either tract. Their land was the southwest quarter, and the south half of the northwest quarter of Section 32. There was no suit against either of those tracts by those

descriptions, and no order to sell either of them by such descriptions in the decree of February 14, 1898, the decree under which the sale to Hunter was made, and so the sales were void.

Patrick v. Davis, 15 Ark. 363.
Hershey v. Thompson, 50 Ark. 484.
Texarkana Water Co. v. The State, 62 Ark. 188.
Cooley on Taxation (1st. Edn.), Ch. 12, p. 279, etc.
Black on Tax Titles (1st Edn.), Secs. 38 and 220.
Blackwell on Tax Titles (2d Edn.), p. 123, etc., 281, etc., 381, etc.
Boyd v. Bright, 1 Story, C. C. R. 487.
Schattler v. Casinelli, 56 Ark. 172.
Tatum v. Croom, 60 Ark. 487, 491.

In Ronkendorff v. Taylor, 4 Peters 349, it was decided that a part of a lot may be sold for taxes, but if it be an undivided part, it must be so described in the published notice. The court said:

"Congress had two objects in view in requiring this notice to be given: (1) To apprise the owner of the property; and (2) to give notice to persons desirous of purchasing.

"These objects are important. It is necessary for the interest of the owner that he should be informed of a proceeding which, unless arrested by the payment of the tax, would divest him of his property. And it is of equal, if not greater, importance that the property should be so definitely described that no purchaser could be at a loss to estimate its value. It is not sufficient that such a description should be given in the advertisement as would enable a person desirous of purchasing to ascertain the situation of the property by inquiry. Nor if the purchaser at the sale had been informed of every fact necessary to enable him to fix a value upon the property, yet the sale would be void, unless the same information had been communicated to the public in the notice. Its defects, if any exist in the description of the property to be sold, cannot be cured by any communication made to the bidders on the day of the sale by the auctioneer."

In this case, the description in the complaint, in the notice of the suit, in the decree of sale, and in the notice of sale under the decree should have corresponded, and each and all should have conformed to the description in the assessment made of the property of A. B. Ballard and Josephine W. Ballard for the levee taxes.

The report of the sale by the commissioner, and the deed he made, show that the west half and the southeast quarter of Section 32—480 acres—were sold and conveyed as one aggregate body or tract, for one price, namely, $77.27, as stated in the report of sale. A. B. Ballard and Josephine W. Ballard did not own the southeast quarter of Section 32, or the north half of the northwest quarter of Section 32, but only the southwest quarter of Section 32, and south half of the northwest quarter of Section 32. The two tracts A. B. Ballard and Josephine W. Ballard owned made up 240 acres, and the two tracts the commissioner undertook to sell and convey to Hunter, embracing such 240 acres, made up 480 acres. And thus the 240 acres, the lands of A. B. Ballard and Josephine W. Ballard, were sold to pay the levee taxes on the 240 acres they did not own or claim, as well as to pay the taxes on the 240 acres, part of the lands sold, which they did own.

This was nothing more than the taking of the lands of A. B. Ballard and Josephine W. Ballard, for the purpose of paying the taxes on the lands to which they had no title, and in which they claimed no interest, and therefore was the taking of their property without due process of law. If the other lands were not taxable, or if they belonged to the State, or the United States, then no levee taxes should have been charged on them. If those lands belonged to other individuals or corporations, and were taxable, then such levee taxes should have been charged only against the lands upon which they were levied, or their owners, and only those lands should have been sold for their payment.

The assessment of several village lots as a part of a fractional quarter section and the sale of "an acre off the east side," was held void.

Ballance v. Forsyth, 13 Howard 18.

The statute required the whole tract to be sold for delinquent taxes to the highest bidder, but for not less than the taxes, penalty and costs, and a sale of a less quantity than the whole for the taxes, penalty and costs was held void.

Richards v. Howell, 60 Ark. 215.

And selling several distinct tracts or subdivisions of land as one body, and for one aggregate price, or the taxes due on all, is illegal, and the sale is void and passes no title.

Pack v. Crawford, 29 Ark. 492.
Cocks v. Simmons, 55 Ark. 104.
Salinger v. Gunn, 61 Ark. 414.
Woolfolk v. Buckner, 60 Ark. 166.
Spain v. Johnson, 31 Ark. 314.
Pettus v. Wallace, 29 Ark. 476.
Birge v. Montgomery, 31 Ark. 491.
Crane v. Randolph, 30 Ark. 579.

There was no authority in the statutes for combining in one suit the levee taxes for more than one year. When in the same suit the levee taxes for 1894, 1895, 1896 and 1897 were sued for, definite and distinct allegations as to the assessments and levies for each year, and the efforts to collect, and the delinquencies, and the facts authorizing the suits, should have been made. The loose and imperfect statements made in the complaint (Record, pp. 12-13) were not what the law requires.

Redfork Levee District v. St. L., I. M. & S. Ry. Co., 96 S. W. Rep. 117 (Ark.).

The sale being void, the report of the sale, by the commissioner to the court, and the confirmation of his report by the court, and the deed made by him even with the

approval of the court, did not pass or affect the title of A. B. Ballard and Josephine W. Ballard to those two tracts. The sale and the deed, notwithstanding what was done, were still alike void.

Shrivers Lessee v. Lynn, 2 Howard, U. S. 25.
Gray v. Brignardello, 1 Wallace 627.
Minnesota Co. v. St. Paul Co., 2 Wallace 609, 640, etc.
Pike v. Wassell, 94 U. S. 711.
Freeman on Void Judicial Sales, Sec. 44, p. 146.
Gaines v. New Orleans, 6 Wallace 643, 714.
Kleber's Void Judicial and Execution Sales, Sec. 442 and Sec. 491.
Falls v. Wright, 55 Ark. 562, and 29 Am. St. R. 100.
Banks v. St. Francis Levee District, 66 Ark. 492-493.
Drake on Attachments, Sec. 89a.
Collins v. Paepcke-Leicht Lumber Co. (Ark.), 84 S. W. Rep. 1046, 74 Ark. 82, 87.
Cowling v. Nelson (Ark.), 88 S. W. Rep 915, and 3 Arkansas Law Rep. 377.

II.

The fourth error assigned is that the lands of the plaintiffs in error were sold for sums not legally chargeable thereon, and thereby they were deprived of them without due process of law, to-wit:

(a). For fees to the commissioner for furnishing the printer with a list of lands to be advertised;

(b). To the commissioner for attending, making and reporting the sale; and

(c). To the printer for publishing notice of the sale of each tract of land.

For the said reasons the decree of sale, and the sales of the lands of the plaintiffs in error were void.

In the decree of the 14th of February, 1898, ordering the sale, it was decreed that there should be allowed the commissioner fees as follows:

(a). For furnishing the printer with a list of lands to be advertised, 5 cents per tract;

(b). For attending, making and reporting the sale, 25 cents per tract;

(c). To the printer for publishing said notice, 50 cents per tract, which fees the decree directed should be taxed as costs against each several tract of land, to be paid by the purchaser or person discharging the lien before the sale. (Record, p. 19.)

It is agreed in the record of this case that the charges were made against the tracts of land sold, belonging to A. B. Ballard and Josephine W. Ballard, according to the requirements of the decree of sale, and were taxed as costs against the lands, and were paid out of the proceeds of the sale by the commissioner after the sales had been completed. (Record, p. 40.)

Act No. 71 of the Acts of the General Assembly of the year 1895, the act under which the suit was brought, and the decree of sale rendered, in providing for the notice to be given to those interested in the delinquent lands proceeded against, directed that the notice should specify, among other things, that a judgment final would be entered, "directing the sale of said lands for the purpose of collecting said delinquent levee taxes, together with the payment of interest, penalty *and costs allowed by law.*"

Acts of 1895, p. 90.

In authorizing the judgment, or decree, to be pronounced for the sale, the act declared only that the court should give judgment in the suit provided for against the persons claiming to be the owners of the lands "for the amount of such assessments, and said penalty of 25 per cent., and interest on said assessment from the end of said thirty days allowed for collection thereof, at the rate of 6 per cent. per annum, and all costs of the proceedings."

Acts of 1895, p. 88.

There was nothing in any of the legislation undertaking to give power to the Chancery Court, or any court, in the suit, to allow, or fix, the fees or costs to accrue in the suit, or to charge such fees or costs on the lands to be sold under the decree, to be pronounced, or paid out of the proceeds of the sales of such lands.

The Constitution of Arkansas divides the government of the State into three distinct departments, and prohibits the judicial department from exercising any legislative power, except in instances expressly provided or permitted in the Constitution. (Article 4.) And, in addition, the Constitution (Sec. 4, Art. 16), provides that the General Assembly shall fix the salaries and fees of all officers in the State, and that no greater salary or fee than that fixed by law shall be paid any officer, employe or other person. The Legislature has provided for and regulated all fees and costs by general laws, and has made it a misdemeanor for any officer to charge, demand or receive any more, or greater, fees for his services than are allowed by law.

Sandels & Hill's Digest, Chap. 64, Sec. 3358; and Kirby's Digest, Chap. 64, Sec. 3542.

Our position is that the Chancery Court, in the suit for the levee taxes, had no power to direct the charging of the fees and costs objected to, or to direct their payment out of the proceeds of the sale, and that that provision of the decree, and the taking of the sum authorized to be charged out of the proceeds of the sales of the lands belonging to A. B. Ballard and Josephine W. Ballard, rendered the sales of those lands void, such charges being illegal, and constituted the taking of their property without due process of law.

In reply to this position the court below merely said: "A decree of a court of competent jurisdiction is not subject to a collateral attack because lands were sold thereunder for illegal penalties and costs." (Record, p.

83, and 74 Ark., p. 181.) For the statement made the court cited as authority Kelly v. Laconia Levee District, opinion delivered on the same day, 74 Ark. 202, and Johnson v. Hunter, a decision by Trieber, District Judge, 127 Federal Reporter 219.

If there is anything in Kelly v. the Laconia Levee District on the question, we fail to discover it, and Johnson v. Hunter at the time this case was decided below, was on appeal in the Circuit Court of Appeals of the United States for the Eighth Circuit, and that court recently, on the —— day of August, 1906, reversed the decree, and granted Johnson and others, the plaintiffs and appellants, the relief prayed in their bill, and dismissed the cross-bill of Hunter and others, who occupied in that case the same position that Hunter and others occupy in this case, one of the decrees of sale involved there being the identical same decree in question here.

The objection we make is that the complaint in the suit presented no question as to the right to charge the fees and costs complained of, and that the Crittenden Chancery Court, in embracing them in its decree of sale, not only went outside the complaint, but went outside the statute, and without right put into the decree the adjudication that costs and fees should be paid which had not been sued for, and which the law did not authorize to be recovered. The selling of the lands for the illegal fees and costs was subsequent to the general order in the decree to charge them, and there has been no particular adjudication as against A. B. Ballard and Josephine W. Ballard that the charging of them was proper as against their lands, since the general order in the decree of sale.

The very question that we desire to present in this case is whether or not the Crittenden Chancery Court, in pronouncing the decree of sale as to the matter we now complain of, was a court of competent jurisdiction to make the decree, and the further question whether or not

we are making, in this case, a collateral attack on the decree, and the court below has disposed of our contentions by simply assuming a state of facts the opposite of the facts we rely on, and which we are obliged to controvert in order to present the questions.

In Elsey v. Falconer, 56 Ark. 419, the complaint in an overdue tax suit alleged that the taxes on the land proceeded against were due for a certain year only, and the warning order gave notice that the suit was for those taxes. A judgment or decree by default was entered in the suit, and that judgment included unpaid taxes on the same land for other years, in addition to the year mentioned in the complaint and notice. A sale was made of the land, under the decree, and the question was whether the purchaser got a good title. Hemmingway, Judge, said: "When the court went outside the right asserted in the complaint, and attempted to adjudicate rights not therein set up, or in any way referred to, it exceeded its power, and its decree, insofar as it determines such rights and orders their enforcement, was without jurisdiction and void." 56 Ark. 422. After stating the fact that the decree had adjudicated the claim asserted in the complaint and notice, for taxes, and had included a claim for taxes not asserted in the complaint, or mentioned in the notice, and stating that the sale had been made of the land under the decree for the whole, the judge said he had found no direct authority upon the effect of such a sale. He referred to Litchfield v. Cudworth, 15 Pickering (Mass.) 23, and Adams v. Morrison, 4 New Hampshire 166, and Sillsbee v. Stockle, 44 Mich. 561, and then said that, after much hesitation, the court had concluded that the sale was void as to the land sold—that is, that the purchaser got no title by his purchase.

In Falls v. Wright, 56 Ark. 562, the widow filed a petition in the Probate Court to have commissioners appointed to ascertain and report her dower in lands described in the petition. The commissioners reported

dower in those lands, and also assigned dower in lands not described in the petition. The Probate Court confirmed the action of the commissioners, including their action in assigning dower in the land not embraced in the petition. The court held the decree absolutely void as to the land not described in the petition on a collateral attack. In the opinion the court referred to Giffard v. Hort, 1 Schoales & LeFroys 108; Gore v. Stackpole, 1 Dowling 30; Colclough v. Sterum, 3 Bligh 186; Munday v. Vail, 34 New Jersey (Law) 420; Corwithe v. Griffing, 21 Barbour (N. Y.) 9, and Reynolds v. Stockton, 43 New Jersey (Equity) 211. And see Swing v. St. Louis Ref. & W. G. Co., an opinion by the Supreme Court of Arkansas, handed down on the 24th of March, 1906, where a judgment of the Supreme Court of Ohio was denied effect, because the pleadings and proceedings showing that court was empowered to render the judgment were not produced.

93 S. W. Rep. 978.

And see also—

Owings v. Hull, 9 Peters 624-625; and
Hallum v. Dickinson, 47 Ark. 120, 124.

There is nothing in this record preventing the consideration by this court of the question whether the sale of the lands of A. B. Ballard and Josephine W. Ballard was unlawful, because made for fees, or for costs not legally chargeable thereon. They were not brought lawfully before the court by the personal service or process, or by notice, and never appeared in the suit before the decree of sale. Josephine W. Ballard was not only not named as a defendant in the suit, but her name does not appear anywhere in the record until she entered her appearance to make the present contest. The costs or fees now objected to were not sued for in the suit, and were not fixed by law as the legitimate result of the decree of sale made. If, as a matter of law, those fees and costs were not charges, or due on the day of sale from A. B.

Ballard and Josephine W. Ballard, or their lands, then the sale of the lands for that reason alone was void, as the sale was not due process of law.

Collins v. Paepcke-Leicht Lumber Co., 84 S. W. Rep. 1044; 74 Ark. 86.
Cowling v. Nelson (Ark.), 88 S. W. 914, and 3 Ark. Law Rep. 377.

A sale of land for taxes in excess of the amount due, or embracing costs not legally chargeable, even though the excess, or the costs, amount only to a few cents, is void.

Goodrum v. Ayers, 56 Ark. 93.
Pack v. Crawford, 29 Ark. 491.
Cooper v. Freeman Lumber Co., 61 Ark. 36.
Salinger v. Gunn, 61 Ark. 414.
Alexander v. Gordon, 101 Fed. Rep. 95.
Muskegon Lumber Co. v. Brown, 66 Ark. 539.
Darter v. Houser, 63 Ark. 476.
Harvey v. Douglass, 73 Ark. 221.

An exception to the rule was made in Cowling v. Muldrow, 71 Ark. 488, where the amount of the taxes due was $4.28 3-4, and the sale was for $4.29 on the maxim "*de minimis non curat lex.*" But it is the only exception which has been made so far as we can ascertain.

If the collector is authorized to sell only enough of the land to pay the taxes, and offers and sells the entire tract, or sells more than enough property to pay the taxes due, the sale is void.

Stead's Exrs. v. Course, 4 Cranch 403.
French v. Edwards, 13 Wallace 506.

Mason v. Fearson, 9 Howard 248.

A sale of land purporting to be for the taxes due for a number of years, when only the taxes for a part of such years are due, is void.

Mitchell v. Kinsworthy, 21 Ark. 154-155.

Elsey v. Falconer, 56 Ark. 419.
Gage v. Pumpelly, 115 U. S. 454.
Drake v. Ogden, 128 Illinois 603.
Gage v. Lyons, 138 Illinois 590.

In the courts of Arkansas and in the courts of the United States it is settled that fees and costs, beyond those provided in the statutes governing, cannot be recovered by one party from another in any suit, and that the courts are without power to make orders or render judgments or decrees for them outside the statutes.

Thorn v. Clendenin, 12 Ark. 60.
Crittenden County v. Crump, 25 Ark. 235.
Standford v. Wheeler, 28 Ark. 144.
Cole v. White County, 32 Ark. 50.
Fanning v. The State, 47 Ark. 442.
Logan County v. Trimm, 57 Ark. 487.
Wilson v. Fussell, 60 Ark. 194.
State v. Blackburn, 61 Ark. 407.
Cowling v. Nelson, 88 S. W. Rep. 914 and 3 Ark. Law Rep. 377.
O'Neil v. K. C., F. S. & M. Ry. Co., 31 Fed. Rep. 663.
United States v. Marsh, 106 Fed. Rep. 474.
United States v. Shields, 153 U. S. 88, 91.

The remedy for the collection of ordinary taxes is not only summary, but generally is such as the Legislature prescribes and no other.

Cooley on Taxation, Chap. 14, p. 300.
Black on Tax Titles, Sec. 44.
Murray v. Hoboken Land & Improvement Co., 18 Howard, 272.
Loan Association v. Topeka, 20 Wallace 660.
McMillen v. Anderson, 95 U. S. 37.

The levy and collection of all such taxes is the exercise of a legislative power, and not only is summary, but usually the courts have no agency in the matter unless specially called in by the legislation. Such taxes are burdens or charges imposed to raise money for public purposes, but they are not debts (Lane County v. Oregon,

7 Wallace, 75), and, in the absence of a statute authorizing it, a suit at law, or in equity, cannot be maintained for their recovery.

Heine v. Levee Commissioners, 19 Wallace, 655.

In many of the States there have been statutes providing for judgments or decrees in courts of record, as a part of the process of collecting ordinary taxes, but such judgments or decrees have usually been pronounced without the bringing of any formal suit against the particular tax debtor, and without any special notice to him, and have never been supposed to attach even as against him, any judicial sanctity to the process of collecting the taxes made through their instrumentality, or to be anything more than an act of some legislative agent in the course of the proceeding to accomplish the collection. The case of Elsey v. Falconer, already referred to, is an example.

And French v. Edwards, 13 Wallace, 514, decided the question.
And see Walker v. Turner, 9 Wheaton, 541; and Moore v. Brown, 11 Howard, 414.

And for others see:

Woods v. Freeman, 1 Wallace, 398.
McClung v. Ross, 5 Wheaton, 116.
Thatcher v. Powell, 6 Wheaton, 119.
Gregory v. Bartlett, 55 Ark. 30.
Martin v. Barbour, 34 Fed. Rep. 701 and 140 U. S. 634.
Riverside Co. v. Howell, 113 Ill. 259.
Gage v. Pumpelly, 115 U. S. 454.
Dick v. Foraker, 155 U. S. 404.
Beidler v. Beidler, 71 Ark. 318.
McMahan v. Smith, 69 Ark. 591.
Memphis Land & Timber Co. v. Board Directors St. Francis Levee District, 70 Ark. 409.
Pope v. Campbell, 70 Ark. 207.
Williams v. Harris, 4 Sneed (Tenn.) 332.
Hightower v. Freedle, 5 Sneed (Tenn.) 312.
Randolph v. Metcalf, 6 Coldwell (Tenn.) 400.
Caldwell v. Barrett, 71 Ark. 310.

There is a well recognized distinction between ordinary taxes and special assessments for local improvements, such as the levee taxes in question here. The distinction is so broad that an exemption from ordinary taxes will not relieve from liability for special assessments for local improvements. (Illinois Central R. R. v. Decatur, 147 U. S. 190.) The theory on which special assessments for local improvements are levied, is that the property upon which they are imposed is peculiarly benefited and, therefore, that the owners do not, in fact, pay anything in excess of what they receive by reason of the improvements.

Carson v. The St. Francis Levee District, 59 Ark. 514, 536, etc.
Hagar v. Reclamation District, 111 U. S. 104, etc.
Shoemaker v. United States, 147 U. S. 297.
Norwood v. Baker, 172 U. S. 269.

Such assessments involve a radical interference with the rights of private property, and, from their very nature must be imposed and collected under a special grant of power by the Legislature, and the methods precribed for the assessment and collection must be followed with even greater strictness than the method prescribed for the assessment and collection of ordinary taxes. The general rule is that lands cannot be sold for the payment of special assessments for local purposes, made upon them, without specific legislation providing for such sale —the ordinary authority to sell for public taxes not being applicable to such cases.

Paine v. Spratley, 5 Kan. 525.
Lyon v. Alley, 130 U. S. 177.

III.

THE FIFTH ASSIGNMENT OF ERRORS.

The Acts of the General Assembly, under which the suit was brought, required a notice to be given to the

owners of the lands, of the suit, and no notice having been given A. B. Ballard and Josephine W. Ballard, the decree of sale, and the sale of their lands, for want of such notice, were void.

The record fails to show any notice to either A. B. Ballard or Josephine W. Ballard, unless the recital in the decree of sale establishes the fact of notice as against them, and estops them from raising the question of notice. That question will be discussed elsewhere. We will present here the question whether or not notice was required, and the effect of its not having been given in the suit.

Act No. 19, of the Acts of 1893, p. 24, declared that the suit provided for to recover the levee taxes should be by Chancery proceedings in the court having Chancery jurisdiction, and authorized that court, in that suit, "to give judgments against the owners of the lands for the amounts of the assessments, and interest thereon, and a penalty, and the costs of the suit, and to cause the lands to be sold by a commissioner appointed by the court."

In other sections it provided (Sec. 11, p. 31, and Sec. 13, p. 32) that the suit should be conducted in accordance with the practice and proceedings of Chancery Courts in Arkansas, and that the law should be liberally construed to give the assessment lists the effect of *bona fide* mortgages, for a valuable consideration, and a first lien upon the lands assessed against all persons having interests in them.

Before this suit was begun, although it embraced levee taxes for 1893 and 1894, the General Assembly had amended the Act of 1893 by Act No. 71, of the Acts of 1895. That act declared that all or any part of the lands in any county might be included in one suit, for the collection of the taxes, and that all the delinquent owners

of such lands, including those unknown, might be included in such suit, as defendants.

It then declared that "A notice of the pendency of such suit shall be given, as against *non-residents of the county*, and unknown owners, respectively, when such suit may be pending, by publication weekly, for four weeks prior to the day of the term of the court on which final judgment may be entered, for the sale of the lands, in some newspaper published in the county where such suit may be pending."

The statute prescribed the form of the notice, and, in doing so, stated the case as follows:

"St. Francis Levee District
v. Notice.
"Delinquent Lands,"

thus making the style of the case, as well as the matter of the notice, statutory.

The notice begun by declaring: "The following named persons and corporations, and all others having or claiming an interest in any of the following described lands, are hereby notified that suit is pending in the Circuit Court of —— County, Arkansas, to enforce the collection of certain levee taxes on the subjoined list of lands, each supposed owner's lands being set opposite his or her or its name, respectively, together with the amounts severally due from each, to-wit:" The statute then required that there should follow "a list of supposed owners, with a descriptive list of said delinquent lands, and amounts due thereon, respectively, as aforesaid." It then prescribed the conclusion of the notice as follows: "Said persons and corporations, and all others interested in said lands are hereby notified that they are required by law to appear and make defense to said suit, or the same will be taken for confessed, and judgment final will be entered directing the sale of said lands, for the purpose of

collecting said delinquent levee taxes, together with the payment of interest, penalty and costs allowed by law.

"_____,

" Clerk of said Court."

(Acts of 1895, pp. 89-90.)

After the conclusion of the form of the notice, the statute declared, "and where the owners are unknown, that fact shall be so stated in said published notice." (Acts of 1895, p. 90.) The statute then required "as against any defendant who resides in the county, where such suit may be brought, and who appears by the record of deeds in said county to be the owner of any of the land proceeded against, notice of the pending suit shall be given by the service of personal summons of the court at least twenty days before the day on which said defendant is required to answer as set out in said summons." (Acts of 1895, p. 90.)

A subsequent part of the same section of the statute provided: "Actual service of summons shall be had where the defendant is in the county, or where there is an occupant upon the lands." (Acts of 1895, p. 92.)

In regulating the judgment to be pronounced, the Act of 1895 declared, "that in all cases where notices have been properly given, as aforesaid, and where no answer has been filed, or if filed and the cause decided for the plaintiff, the court, by its decree, shall grant the relief as prayed in the complaint, and shall direct said commissioner to sell the lands described in the decree." (Acts of 1895, p. 91.)

In prescribing the effect of the judgment, the statute declared: "Said judgment shall provide for sale of said delinquent lands, for cash, by a commissioner of the court, after advertisement as hereinafter set out. Said proceedings and judgment shall be in the nature of proceedings *in rem*, and it shall be immaterial that the ownership

of said lands may be incorrectly alleged in said proceedings, and such judgment shall be enforced wholly against said land and not against any other property or estate of the defendant." (Acts of 1895, p. 89.)

In declaring the effect of the sale by the commissioner the statute provided "said commissioner shall, by proper deeds, convey to the purchasers the land so sold, and the titles to said land shall thereupon become vested in such purchaser as against all others whomsoever, saving to infants and insane persons, the rights given them by Section 12 of the said Act of February 15, 1893." (Acts of 1895, p. 91.)

In its opinion the court below said: "The fact that the lands in controversy were the property of Mrs. Josephine W. Ballard, and she was not made a party defendant to the suit, instituted to enforce the collection of the taxes thereon, does not affect the decree therein, and the sale thereunder. The act provides that such suit and decree shall be in the nature of proceedings *in rem*, and that it shall be immaterial that the ownership of the lands may be incorrectly alleged in said proceedings.'" (Record p. 83.) This was nothing less than deciding that there is no necessity, under the law, that the owner of the land have notice of any character of the suit, or be even made a party defendant to it.

Notwithstanding the announcement of the court we insist that in all cases of proceedings in the nature of proceedings *in rem*, it is settled, in accordance with the provisions of the Statute of Arkansas (Sandel's & Hill's Digest, Sec. 4190, Kirby's Digest, Sec. 4424), that notice to the defendants, or the parties in interest, whose property is proceeded against, or is to be bound by the proceedings in the suit, must be given in the suit, or the judgment or decree, and the proceedings thereunder are void, and without force for want of such notice.

Surely the Supreme Court of Arkansas would not be understood as deciding, or as being ready to decide, that

the land of a resident of Crittenden County, not personally summoned in the suit, or the land of an owner personally in the county, or the land of an owner having an occupant upon it, not served with a summons, would be bound by a decree of sale where he did not appear in the suit, so as to lose his title to his land by a sale under such a decree. If not, does it intend to hold, or would it hold, that A. B. Ballard and Josephine W. Ballard are bound by the decree and sale here, simply because they resided outside of Crittenden County?

We do not have in this case the question of the effect of a decree of sale in Admiralty for several reasons. In the first place the Crittenden Chancery Court is not a Court of Admiralty. In the second place real estate is not the subject of Admiralty jurisdiction.

Harriman v. Rockaway Beach Pier Co., 5 Fed. Rep. 461.
Rock Island Bridge, 6 Wallace 213.

And lastly it is beyond the power of a State Legislature to confer upon State courts jurisdiction in Admiralty.

The Hine v. Trevor, 4 Wallace 556.

We concede that the several States may by statute authorize proceedings strictly *in rem*. The cases relating to proceedings in the Probate Courts having reference to the probate of wills, the administration of estates and the guardianship of infants, are of that character.

Marr ex parte, 12 Ark. 84.
Rogers v. Wilson, 13 Ark. 507.
Sturdy v. Jacoway, 19 Ark. 499.
Montgomery v. Johnson, 31 Ark. 82-83.
Beidler v. Friedell, 44 Ark. 414.
Apel v. Kelsey, 52 Ark. 342.
Thompson v. Tolmie, 2 Peters, 157.
Grignon v. Astor, 2 Howard 319.
Florentine v. Barton, 2 Wallace 210.

Cornett v. Williams, 20 Wallace 226.
Davis v. Gaines, 104 U. S. 386.
Manson v. Duncanson, 166 U. S. 533.

And the statutes and decisions furnish many other instances in which judgments or decrees in proceedings strictly *in rem*, provided for in State legislation where there is a requirement of a sufficient general notice, may be sustained, even as against persons having an interest, but having, in fact, no personal notice of the proceedings.

Evans v. Perciful, 5 Ark. 524.
Bonnell v. Roane, 20 Ark. 114.
Scott v. Pleasants, 21 Ark. 367.
Wallace v. Brown, 22 Ark. 118.
Worthen v. Radcliffe, 42 Ark. 344-345.
McLain v. Duncan, 57 Ark. 49.
Porter v. Dooly, 66 Ark. 1.
Overman v. Parker, 18 Howard 137.
Thomas v. Lawson, 21 Howard 331.
Huling v. Kaw Valley Railway, 130 U. S. 559.
Arndt v. Griggs, 134 U. S. 316.
Lynch v. Murphy, 161 U. S. 247.
Hamilton v. Brown, 161 U. S. 256.
Leigh v. Green, 193 U. S. 89.
Cunnius v. Reading School District, 198 U. S. 458.

But Act No. 19 of the year 1893 and Act No. 71 of the year 1895 in question here do not provide for any proceeding strictly *in rem*.

Wilson v. Gaylord, 92 S. W. Rep. 26, and 4 Arks. Law Reporter, p. 341.

In Freeman v. Alderson, 119 U. S., Justice Field took the distinction between actions *in rem* and actions *quasi in rem* in these words: "Actions *in rem*, strictly considered, are proceedings against property alone, treated as responsible for the claims asserted by the libellants or plaintiffs. The property itself is in such actions the defendant and, except in cases arising during war for its hostile character, its forfeiture or sale is sought for

the wrong in the commission of which it has been the instrument, or for debts or obligations for which by operation of the law it is liable. The court acquires jurisdiction over the property in such cases by its seizure, and of the subsequent proceedings by public citation to the world, of which the owner is at liberty to avail himself by appearing as a claimant in the case. There is, however, a large class of cases which are not strictly actions *in rem*, but are frequently spoken of as actions *quasi in rem*, because, though brought against persons, they only seek to subject certain property of those persons to the discharge of the claims asserted. Such are actions in which property of non-residents is attached and held for the discharge of debts due by them to the citizens of the State, and actions for the enforcement of mortgages and other liens. Indeed, all proceedings having for their sole object the sale or other disposition of the property of the defendant to satisfy the demands of the plaintiff, are in a general way thus designated, but they differ among other things from actions which are strictly *in rem*, in that the interest of the defendant is alone sought to be affected, that citation to him is required, and that judgment therein is only conclusive between the parties."

119 U. S. 187-188.

In Arkansas it has been decided a great number of times that a judgment rendered without notice is void.

Cross ex parte, 7 Arks. 44.
Pile ex parte, 9 Arks. 336.
Gibson ex parte, 10 Arks. 572.
Miller v. Barkeloo, 8 Arks. 318.
Baskins v. Wylds, 39 Arks. 347.
Levy v. Ferguson Lumber Co., 51 Arks. 317.
Greenstreet v. Thornton, 60 Arks. 369.
Silver v. Luck, 42 Arks. 268.
Bozeman v. Browning, 31 Arks. 377.
Ford v. Adams, 54 Arks. 137.
Barkman v. Hopkins, 11 Arks. 157.
Iglehart v. Moore, 16 Arks. 46.

Wilson v. Gaylord, 4 Arks. Law Rep., p. 341, and 92 S. W. Rep., p. 26.

But the decisions of the courts of Arkansas do not control in this case. The question of notice of a suit to a party whose person or property is to be affected by the judgment, especially where he is a citizen of another State, is a question arising under the Constitution of the United States. Notice to such party is essential to constitute the proceeding and judgment due process of law. And the notice must be given within the jurisdiction of the sovereignty whose court renders the judgment.

Justice Gray said in Scott v. McNeil, 154 U. S. 46: "No judgment of a court is due process of law if rendered without jurisdiction in the court, or without notice to the party."

And see:

Harris v. Hardeman, 14 Howard, 343-346.
Earle v. McVeigh, 91 U. S. 503.
Harkness v. Hyde, 98 U. S. 476.
Kibbe v. Benson, 17 Wallace 624.
Alexandria v. Fairfax, 95 U. S. 774.
Amy v. Watertown No. 1, 130 U. S. 301.
Knowlton v. Watertown, 130 U. S. 327-334.
St. Clair v. Cox, 106 U. S. 350.
Goldey v. Morning News, 156 U. S. 518.
Conley v. Mathieson Alkali Works, 190 U. S. 411.
Pana v. Bowler, 107 U. S. 529.
Cheely v. Clayton, 110 U. S. 701.
Wilson v. Seligman, 144 U. S. 41.
Pennoyer v. Neff, 95 U. S. 714-727.
Bischoff v. Weathered, 9 Wallace 812-814.
Haddock v. Haddock, 201 U. S. 567-568.

In Hagar v. Reclamation District, 111 U. S. 707-708, after referring to Davidson v. New Orleans, 96 U. S. 97, 104, the court said: "By 'due process' is meant one which, following the forms of law, is appropriate to the case, and just to the parties to be affected. It must be

pursued in the ordinary mode prescribed by the law. It must be adapted to the end to be attained, and whenever it is necessary for the protection of the parties, it must give them an opporunity to be heard respecting the justice of the judgment sought. The clause in question means, therefore, that there can be no proceeding against life, liberty or property, which may result in the deprivation of either, without the observance of those general rules established in our system of jurisprudence for the security of private rights."

In Windsor v. McVeigh, 93 U. S. 274, this court decided (1) that the sentence of a court against a party, without hearing him or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal. (2) That the jurisdiction acquired by the seizure of property in a proceeding *in rem*, for its condemnation for alleged forfeiture, is not to pass upon the question of forfeiture absolutely, but to pass upon that question after opportunity has been afforded to its owner and the parties interested to appear and be heard upon the charges for which the forfeiture is claimed. To that end some notification of the proceedings, beyond that arising from the seizure, describing the time within which the appearance must be made, is essential.

The principle stated was applied to the suits brought under the Acts of Congress during the war of the rebellion, providing for the confiscation of the property of persons engaged in rebellion against the government of the United States, and the case referred to was one of that class of cases.

See Earle v. McVeigh, 91 U. S. 503-510.
Alexandria v. Fairfax, 95 U. S. 774.

In New Orleans Water Works v. New Orleans, 164 U. S. 471, a proposition in the syllabus is: "In the absence

of parties interested and without their having an opportunity to be heard, the court is without jurisdiction to make an adjudication affecting them." In the course of his opinion Justice Harlan said: "We do not suppose that any precedent can be found that would justify a court of equity in giving such relief (relief against a party not before the court). A decree declaring the ordinances in question void would have no effect upon the rights of the beneficiaries named in the ordinances for, in the absence of the parties interested, and without their having an opportunity to be heard, the court would be without jurisdiction to make an adjudication affecting them. Such a decree would appear upon the very face of the record not to be due process of law, and could be treated everywhere as a nullity." (164 U. S. 480.)

In Earle v. McVeigh, 91 U. S. 509-510, this court said: "Even in proceedings *in rem* notice is requisite in order that the sentence may have any validity." In Stuart v. Palmer, 74 New York 183, a well considered case, these propositions were decided:

"(1) A law imposing an assessment for a local improvement, without notice to and a hearing, or an opportunity to be heard, on the part of the owner of the property to be assessed, has the effect to deprive him of his property without due process of law, and is unconstitutional.

(2) The Legislature may prescribe the kind of notice and the mode in which it may be given, but it cannot dispense with all notice.

(3) It is not enough that the owner may by chance have notice, or that he may, as a matter of favor, have a hearing. The law must require notice and give a right to a hearing.

(4) So also it is immaterial that the assessment has been in fact fairly apportioned. The constitutionality

of the act is to be tested not by what has been, but by what may be, done under it." (74 New York, 190-191.)

In Scott v. McNeil, 154 U. S. 46-47, the court said: "Even a judgment in proceedings strictly *in rem* binds only those who could have made themselves parties to the proceedings, and who had notice, either actually or by the thing condemned being first seized into the custody of the court. The Mary, 9 Cranch. 143-144; Hollingsworth v. Barbour, 4 Peters 466-475; Pennoyer v. Neff, 95 U. S. 714-727. And such a judgment is wholly void if a fact essential to the jurisdiction of the court did not exist." In Roller v. Holly, 176 U. S. 398, a judgment in a proceeding *in rem* was held void because sufficient notice was not given to the owner of the land of the suit in which it was sold.

In Turpin v. Lemon, 187 U. S. 51, a case involving general taxes, a paragraph of the syllabus is: "Exactly what due process of law requires in the assessment and collection of general taxes has never yet been decided by this court. While it has been held that notice must be given to the owner at some stage of the proceeding for condemnation or imposition of special taxes, it has also been held that laws for the assessment and collection of general taxes stand upon a somewhat different footing, and are construed with the utmost liberality, sometimes even to the extent of holding that no notice whatever is necessary (Mr. Justice Field's definition of due process of law in Hagar v. Reclamation District, 11 U. S. 701, followed), and the Fourteenth Amendment is satisfied by showing that the usual course prescribed by the State laws requires notice to the taxpayers, and is in conformity with natural justice."

In the opinion Justice Brown said: "Exactly what due process of law requires in the assessment and collection of general taxes has never yet been decided by this court, although we have had frequent occasion to hold that in

proceedings for the condemnation of land under the laws of eminent domain, or for the imposition of special taxes for local improvement, notice to the owner at some stage of the proceedings, as well as an opportunity to defend, is essential. Spencer v. Merchant, 125 U. S. 345; Huling v. Kaw Valley Railway, 130 U. S. 559; Hagar v. Reclamation District, 111 U. S. 701; Paulsen v. Portland, 149 U. S. 30." 187 U. S. 57-58.

In Hodge v. Muscatine County, 196 U. S. 276, where the statute in question imposed a lien on the real property of the landlord, occupied by a tenant, for the tax on the business carried on upon it by the tenant, the necessity of notice to the landlord, so as to give him an opportunity to test the validity of the tax at some time before the tax became final, was fully recognized, and the decision against the landlord as to the liability of his land for the tax was put on the ground that under the general law of the State he had been given notice of the assessment, and an ample opportunity to make defense as to the liability of the property for the tax. In this connection the court said: "If the taxpayer be given an opportunity to test the validity of the tax at any time before it is made final, whether the proceedings for review take place before a board having a *quasi* judicial character, or before a tribunal provided by the State for the purpose of determining such questions, due process of law is not denied." (196 U. S. 281.)

Carson v. St. Francis Levee District, 59 Ark. 513, was decided on the 21st day of July, 1894, and Act No. 71 of the Acts of 1895 in question here was passed on the 2d day of April, 1895. The opinion in Carson v. The St. Francis Levee District clearly conveys the idea that, under Act No. 19 of the Acts of 1893, notice of the suit authorized, though not required in express words by the act, was necessary under the proper construction of Section 11 of that act. (59 Ark. 536.) And in the Memphis Land & Timber Co. v. the St. Francis Levee District, 64

Ark. 258, though only the levee taxes for the years 1893 and 1894 were sued for, the court laid stress upon the requirement of Act No. 19 of the Acts of 1893, that the suit should be conducted in accordance with the practice of Chancery courts, and that the statute should be liberally construed to give the assessment lists the effect of *bona fide* mortgages, for a valuable consideration, and a first lien on the property. (64 Ark. 263-264.)

Usually the construction of the constitution and statutes of a State is for the courts of that State and the courts of the United State adopt the settled construction as established by such State courts. But the principle is not applied in any case where a violation of the Constitution of the United States is involved, or is the question to be decided. In that class of cases the courts of the United States are not controlled by the decisions of the courts of any State. They decide the law for themselves. Whether the obligation of a contract has been impaired, or whether a citizen has been deprived of his property without due process of law and similar questions are determined, when presented in the courts of the United States, without reference to the local laws, or decisions of the courts of the State where the controversy arose, even upon their own constitution or statutes.

This court in this case, therefore, must put its own construction upon Act No. 19 of the Acts of the General Assembly of the year 1893, and Act No. 71 of the General Assembly of the year 1895, and is in no way bound or controlled in this case by the construction put by the Supreme Court of Arkansas on those statutes, so far as they are brought in question here, and the case requires the determination of the questions whether or not A. B. Ballard and Josephine W. Ballard have been deprived of their property by those statutes, or by the judgment or proceedings of the court below, without due process of law, or have been denied the benefit of the laws of the State of Arkansas, or have been denied the privileges and

immunities of citizens of the United States, or have been denied the privileges and immunities of citizens of Arkansas, or have been denied the equal protection of the laws within that State. Since the Fourteenth Amendment became a part of the Constitution these propositions have been beyond dispute.

In Scott v. McNeil, 154 U. S. 34, the court said: "Upon a writ of error to review the judgment of the highest court of a State upon the ground that the judgment was against a right claimed under the Constitution of the United States, this court is no more bound by that court's construction of a statute of the Territory, or of the State, when the question is whether the statute provided for the notice required to constitute due process of law than when the question is whether the statute created a contract, which has been impaired by a subsequent law of the State, or whether the original liability created by the statute was such that a judgment upon it has not been given due faith and credit in the courts of another State. In every such case this court must decide for itself the true construction of the statute."

154 U. S. 45.

And see Butz v. City of Muscatine, 8 Wallace, 582-584.

Pennoyer v. Neff, 95 U. S. 733, etc.

Burgess v. Seligman, 107 U. S. 32, etc.

Carroll County v. Smith, 111 U. S. 562, etc.

Anderson v. Santa Anna, 116 U. S. 362, etc.

Spencer v. Merchant, 125 U. S. 352, etc.

Huntington v. Attrill, 146 U. S. 683, etc.

Mobile & Ohio Rialroad v. Tennessee, 153 U. S. 492, etc.

Great Southern Hotel Co. v. Jones, 193 U. S. 542, etc.

It is not possible to reconcile the opinion of the court below in this case, and the decree now in question on this writ of error, to the effect that it was not material that Mrs. Josephine W. Ballard was not made a party to the suit, and that her absence from the suit does not affect

the decree, or the sale thereunder as to her title, with other decisions made by the same court both before and after this case was decided below.

In Greenstreet v. Thornton, 60 Ark. 369, the proceeding was, under the statute (Sandel's and Hill's Digest, Sec. 5344, etc.), to collect an assessment for a local improvement, and there was a sale of the property, under the decree pronounced, and a conveyance to the purchaser under the sale. A suit was brought by the heir at law of the person alleged in the complaint to be the owner, to set aside the decree of sale, and to cancel the deed of the purchaser. The person named as defendant in the suit with reference to the property sold was dead when the suit was brought, and the title was then in his heir at law, and there was a warning order as to him, based upon a summons returned, not to be found, and a publication under the statute as to such dead person. The notice was general to the unknown owner, whoever he might be (60 Ark. 373), but there was no allegation in the complaint, as required by the statute, of the fact that the owner was unknown, and so that method of giving notice was not authorized by the statute. The court held that the decree in the suit was void, and that the sale passed no title, and that the heir at law of the deceased alleged owner could attack the decree and the sale collaterally, and pronounced a decree canceling them.

In Wilson v. Gaylord, 92 Southwestern Reporter 26, and 4 Arkansas Law Reporter 341, decided January 20, 1906, the plaintiff, to make out his title, showed a conveyance to him by a commissioner in chancery, under a decree of the Chancery Court, in a suit brought by the Board of Directors of the St. Francis Levee District, under one of the statutes in question in this case, No. 19 of the Acts of the year 1893, against certain named individuals to enforce the payment of levee taxes exactly similar to those sought to be enforced in this suit. It was not shown in that suit that the defendants, who were named

in the complaint, had any title to the land sold. The court held that the decree and sale established nothing more than that the title possessed by the defendants named passed to the purchaser at the sale under the decree; that the suit was *in personam* against those defendants only, and affected the rights of no persons who were not parties to that proceeding; that the decree was personal as to those parties for the amount of the levee taxes, penalty and costs, and a lien on the land only as to them and their privies, and as it had not been shown that they had any title to the land sold at the time the decree was rendered, that the purchaser acquired no title. Greenstreet v. Thornton was referred to and approved.

Recurring to the record in this case, it will be found that the suit was not against the "Delinquent Lands," as seems to have been contemplated in the Act of 1895 (Acts of 1895, p. 89), nor in the name of "The St. Francis Levee District," which was named there as the plaintiff in the suit authorized, but was by the Board of Directors of the St. Francis Levee District, and against individuals, beginning with the Memphis Land and Timber Company, and naming many others, all persons or corporations, assumed to own, or to have interests in, the lands proceeded against. (Record, p. 9.)

The prayer of the complaint was that "a warning order issue for the non-resident defendants herein named requiring them to answer the complaint of the plaintiff." (Record, p. 13.)

And when the decree came to be pronounced, under which the sales now complained of were made, the case was styled "The Board of Directors of the St. Francis Levee District v. the Memphis Land and Timber Company, et al., defendants," and the decree proceeded then to name a large number of persons or corporations as defendants, being substantially the same who had been named as defendants in the complaint (record, p. 14, etc.), and, in the decretal part, to adjudge that the Board of

Directors of the St. Francis Levee District "do have and recover, of and from the defendants severally, to be enforced against said lands, the amount of the taxes, interest, penalty and costs assessed, levied and extended against the lands belonging to each of said defendants, respectively." (Record, p. 17.)

In Hassall v. Wilcox, 130 U. S. 493, one of the cases referred to for authority by the judge delivering the opinion in Wilson v. Gaylord, just mentioned, Justice Blatchford, delivering the opinion of the court, said: "One of the exceptions taken by Wilcox to the master's report was that the master had, by his finding, nullified the legal force and effect of the judgment of the State court. The Circuit Court may have proceeded on that ground in its decree. But we do not think that the proceeding in the State court can be sustained as one *in rem*. It is essential to such a proceeding that there should be at least constructive notice by some form of publication, or advertisement, to adverse claimants, to appear and maintain their rights before a judgment in such a proceeding can operate, even as *prima facie* evidence. (Windsor v. McVeigh, 93 U. S. 274, 278, 279.) In the present case no notice, either personal or constructive, was provided for by the Texas statute, or was given to the other lien holders."

130 U. S. 504.

The provision in section 10 of Act No. 19, of the Acts of 1893 (p. 30), that "said assessments shall be a lien on said lands in the nature of a mortgage, and shall bear interest," taken in connection with the requirement (Sec. 11, p. 31, and Sec. 13, p. 32, Acts of 1893, and Sec. 2, p. 92, Acts of 1895) that the law shall be liberally construed "to give the assessment lists the effect of *bona fide* mortgages for a valuable consideration and a first lien upon the lands assessed against all persons having interests in them," necessarily required that the suit be conducted substantially as a suit in equity to foreclose a mortgage. A mortgage always presupposes an equity in redemption

in the mortgagor, and it is the peculiar solicitude of a court of equity to protect that equity of redemption in every reasonable way. To this end there is never a decree of foreclosure, or of sale for foreclosure, until the mortgagor is before the court by the service of process, or notice, or has appeared. And then by the decree pronounced foreclosing the mortgage, the court always sees that the mortgagor has the benefit of his equity of redemption, by time given him to pay the mortgage debt before the sale, or by providing for him the right to redeem from the sale. These provisions of the statute, therefore, of themselves required the service of process upon, or notice to, A. B. Ballard and Josephine W. Ballard in this suit before the decree for the sale of their lands was passed.

Martin v. Ward, 60 Ark. 510.
Clark v. Reyburn, 8 Wallace 318.
Bigler v. Waller, 14 Wallace 297.
Howell v. Western R. R. Co., 94 U. S. 463.
Shillaber v. Robinson, 97 U. S. 68.
C. & V. R. R. Co. v. Forsdick, 106 U. S. 47, 71-72.
2 Jones on Mortgages, Secs. 1563, 1565, 1573, 1586, and 1038-1046.

In State v. Bailey, 27 Ark. 473, the court decided that a court of chancery has no jurisdiction of a bill brought *in rem* against land to foreclose a mortgage given on it, and that such jurisdiction can be conferred only by a statute so providing.

Gregg, Judge, delivering the opinion in that case, said:

"There are certain well fixed rules to which every proceeding in chancery must conform, and among them is the rule, never departed from to my knowledge, that a suit in chancery must be a proceeding *in personam*. Certainly a court of chancery may, as incident to a suit brought, lay hold of property and hold it subject to the final result of the suit, but can, according to the rules of equity jurisprudence, never proceed directly against property as a party to the suit."

27 Ark., p. 477.

In Pardee v. Aldridge, 189 U. S. 429, it was held that a suit to foreclosure a mortgage is not a proceeding *in rem* which will bind persons who are not parties thereto, and the fact that the decree covered the property in question does not conclude strangers to the suit. In replying to the position taken in that case, that the proceeding was *in rem*, and that the decree brought the property into the custody of the court so as to invalidate a sale without the leave of the court, which had been made, Justice Holmes said: "But a suit in equity is not a proceeding *in rem*, properly so called. It does not purport to summon, or invite, by notice, or otherwise, all the world to come in, so far as there are any adverse interests. It is more personal even than the common law, and works out its decrees by orders to the defendants. Of course, the adjudication in such a suit does not conclude strangers."

189 U. S. 433.

And see Gardner v. Ogden, 22 New York, 332-339.

In Bardwell v. Collins, 44 Minn. 97, the statute of Minnesota providing for the service of summons in actions for the foreclosure of real estate mortgages, applicable also to actions to enforce mechanics' liens, was involved. That action was to enforce a mechanic's lien. The complaint alleged that Collins, the defendant, claimed a lien on the interest in the property on which the lien was sought to be enforced, but it was subsequent and inferior to the lien of Bardwell, the plaintiff, and that no personal claim was made against Collins. It nowhere appeared whether Collins was, or was not, a resident of the State. The court presumed he was a resident, and could have been found within the jurisdiction of the court.

The only service of the summons upon Collins was by publication, and no affidavit for publication was ever filed with the clerk of the court, as provided by the general statute. Judgment was entered against Collins by default, and he moved to set it aside on the ground that the court had never acquired jurisdiction of his person, as

there had been no valid service of the summons on him. His motion was refused, and he appealed.

The Supreme Court held that the service of the summons on Collins by publication in a newspaper was not due process of law, and was void, and that "any statute assuming to authorize it was unconstitutional."

The court said it would be of little use to cite authorities upon the subject, which had been fully discussed, but referred to Brown v. The Board of Levee Directors, 50 Miss. 468, as a case in point.

This last case announces the doctrine that the provision to be found in all the State Constitutions, and also in the Fourteenth Amendment to the Constitution of the United States, "that no person shall be deprived of life, liberty or property, except by due process of law," inhibits the Legislature "from dispensing with personal service, where it is practicable, and has been usual under the general law."

50 Mississippi, p. 481, etc.

In its opinion the court below, after stating (record, pp. 82-83) that the act of the General Assembly provides for notice of the pendency of the suit for the enforcement of the collection of the levee taxes, to non-resident owners, by publicatin in some newspaper, and that such notice, in similar cases, has uniformly been held reasonable, said: "The law of which they (owners) are bound to take notice advises them that their lands in the Levee District are subject to taxation for levee purposes, and of the times and places when and where they will be assessed, and taxes levied thereon; when these taxes shall be paid, and, if not paid, suits will be instituted in certain courts to enforce the collection thereof by sale, and that notice of the pendency of the suit would be given them by publication in a newspaper published in the county wherein the lands lie. The law warns them (non-

resident owners) of the necessity of being vigilant, and gives them the information by which they can protect their property against sales."

Then immediately, in deciding the case against Josephine W. Ballard, who had not been made a defendant to the suit to enforce the collection of the levee taxes, and saying that fact did not affect the decree in the suit, or the sale, the court added: "The act provides that such suit and decree shall be in the nature of proceedings *in rem*, and that 'it shall be immaterial that the ownership of the lands may be incorrectly alleged in said proceedings.'" (Record, p. 83.)

We deny that A. B. Ballard and Josephine W. Ballard, non-residents of the State of Arkansas, and citizens and residents, respectively, of the States of Florida and Georgia, were bound to take notice of Act No. 19 of the Acts of the General Assembly of the year 1893, or Act No. 71 of the year 1895, or of the suit brought under those acts, or the proceedings had in the suit.

They were entitled to notice of the acts of the Legislature, and of what was done under them, and, more particularly, of the suit brought to enforce the collection of the levee taxes. It was, in substance, conceded in Carson v. The St. Francis Levee District, 59 Ark. 535-536, that the land owners, under the acts of the Legislature, were not to be given any notice of the time and place when and where their lands would be assessed, and the levee taxes levied thereon. It is manifest, from reading the legislation itself, that no such notice was provided. The court put its decision dispensing with the notice of the assessment, or the levy of the levee taxes, on the ground that a notice and an opportunity to make defense was provided for, to the owners of the lands, of the suit authorized in section 11 of the Act of 1893. The substance of the provisions of that section is contained in the Act of 1895, which has taken its place, and which has prescribed a notice in words, and has thereby afforded the land owners

an opportunity of making a qualified defense against the assessments, or rather of defending the suit brought to recover the levee taxes.

It cannot be claimed upon the present record that A. B. Ballard and Josephine W. Ballard ever had any notice of anything done with reference to their lands under the two acts of the General Assembly, charging the levee taxes, unless they had the notice of the present suit directed in Act No. 71 of the Acts of 1895. Whether notice was given them under that act, of the suit, will be discussed in another place.

All the legislation having reference to the St. Francis Levee District is local and special only. The first act, No. 19, of the Acts of 1893 (Acts of 1893, p. 24), as amended by Act No. 75 of the same session (Acts of 1893, p. 119), and all other acts, apply only to the St. Francis Basin, and embrace the territory between the Mississippi River, on the east, and the high water line along the base, or slope, of the highlands west of the St. Francis River, on the West. The north boundary is the south line of the State of Missouri. The south boundary is the left bank of the St. Francis River at its confluence with the Mississippi River, and then the south line of Lee County west from its intersection with the left bank until it reaches the high water line along the highlands on the west.

The territory embraced constitutes portions only of Phillips, Lee, St. Francis, Cross, Poinsett and Craighead counties, and all of only Crittenden and Mississippi counties. The acts created a Board of Directors, and named the original members of it, and empowered that board to levee "the St. Francis front in this State (Arkansas), and to protect and maintain the same * * * by building, rebuilding, repairing and raising levees on the right bank of the Mississippi River, or such other places as the said board may select," and for that purpose, and in the method prescribed in the act, to make assessments on

the lands in the Levee District, and levy taxes on such assessments, and collect moneys arising therefrom, and use them in doing the required work.

We do not insist that A. B. Ballard and Josephine W. Ballard were necessarily entitled to the service of a personal notice of the existence of the legislation, or of the assessments on their lands for levee taxes, or of the levy of the taxes, nor even of the suit brought to enforce the collection of the taxes. We admit that, being non-residents of the State of Arkansas, they could have been brought before the court by the publication of notice, or the constructive service of process, if there had been statutes providing for such notice, or such service, and the statutes had been substantially pursued. But they were entitled to have the law complied with, and if it has not been complied with, what has been done towards the sale of their lands is void as to them.

This court said, in Earle v. McVeigh, 91 U. S. 508: "Doubtless constructive notice may be sufficient in certain cases, but it can only be admissible in cases coming fairly within the provisions of the statute, authorizing courts to make orders of publication, and providing that the publication, when made, shall authorize the court to decide and decree."

And see:

Hunt v. Wickliffe, 2 Peters, 201, 214-215.
Hollingsworth v. Barbour, 4 Peters, 466, 472, etc.
Galpin v. Page, 18 Wallace, 351, 369.
Guaranty Trust Co. v. Green Cove R. R., 139 U. S. 143, etc.
Roller v. Holly, 176 U. S. 398, 406, etc.

Act No. 19 of the Acts of the year 1893, and Act No. 71 of the Acts of the year 1895, belong to the class usually designated as private statutes, or local statutes, as distinguished from public statutes, or general laws, and the Supreme Court of Arkansas sustained their constitutionality, on the ground that they had been passed under the

permission of Section 25, Article 5, of the Constitution of 1874, which provides negatively:

"That in all cases where a general law can be made applicable, no special law shall be enacted."

Carson v. St. Francis Levee Dist., 59 Ark. 513.

They have not the same effect as public laws or general statutes have.

Chancellor Kent says there is a material distinction between such statutes as the acts here in question, and public statutes, and that a private statute operates on a particular thing, or private person, and does not bind or include strangers in interest to its provisions, and such strangers are not bound to take notice of such act, even though there be no general saving clause of the rights of third persons.

This construction, he says, is supported by the opinion of Sir Matthew Hale, in Lucy v. Levington, 1 Ventris 175, where it is laid down that, though every man be so far a party to a private Act of Parliament as not to gainsay it, yet he is not so far a party as to give up his interest.

1 Kent's Commentaries, *pp. 459-460.

And see:

Potter's Dwarris on Statutes, Chap. 2, pp. 52-57.
Sedgwick on Statutory and Constitutional Law, Chap. 2, *pp. 30-36.
Jackson v. Catlin, 2 Johnson (N. Y.) 263, and 8 Johnson (N. Y.) 520.
McKinnon v. Bliss, 21 N. Y. 206.
Cook v. S. S. Mfg. Co., 1 Sneed (Tenn.), 698, 715-716.
King v. Doolittle, 1 Head (Tenn.) 77.
Miller v. Johnson, 71 Ark. 174.
2 Pomeroy's Eq. J., Sec. 849.
Elmendorf v. Carmichael, 3 Little (Ky.), 475, and 14 Am. Dec. 86.
1 Greenleaf's Evidence, Secs. 480-481.
Leland v. Wilkinson, 6 Peters 317.
Cooley's Constitutional Limitations (6th Edn.), Chap. 5, p. 115.

We do not deny that the State of Arkansas had the power to enact the legislation providing for the assessment and collection of the levee taxes on the lands embraced in the two acts of the General Assembly, and also the power to make the taxes assessed liens on the lands, and, in order to collect the taxes, to provide by legislation for the bringing and prosecution of the special suit in the Chancery Court authorized by the two acts. We concede, too, that the State had the power to provide, by legislation, for the bringing of the lands assessed for taxation and the owners of them, with respect to those lands, before one of its courts as defendants to the suit authorized, by publication of notice, or by substituted service of process, where the owners of the land could not be personally served with process within the State.

See Roller v. Holly, 176 U. S. 398, 402-407.

But the State, as against A. B. Ballard and Josephine W. Ballard, who were citizens of Florida and Georgia, respectively, and resided in those States, and owned the lands in question here, located in Crittenden County, Arkansas, could not authorize the special suit provided for in the two acts of its General Assembly, until those lands were substantially brought under the control of the court, in the suit, in the manner prescribed in its legislation, and could not, in the suit, with respect to those lands, dispense with notice to A. B. Ballard and Josephine W. Ballard, the owners of the institution, or pendency, or object of the suit; or how or when they should appear and make defense, and bind them by the decrees or proceedings in the suit.

Hart v. Sansom, 110 U. S. 151.
Woodruff v. Taylor, 20 Vermont 65.
Brown v. The Board of Levee Commissioners, 50 Miss. 469.
Bardwell v. Collins, 44 Minn. 97.
Smith v. Hurd, 50 Minn. 503.
Dull v. Blackman, 169 U. S. 243.

It was thoroughly settled by the decisions under the acts of Congress providing for the confiscation of the

property of persons engaged in the late rebellion against the government of the United States, that the district courts of the United States acquired no possession of, and no jurisdiction for, the condemnation of property forfeited, and no power to make any order with reference to such property, or fix a lien upon it, encumbering the title, or sufficient to bind the title, until the property was actually seized, or fixed specially under the process authorized by the statute to be issued, for the purpose.

Miller v. The United States, 11 Wallace, 268, 294, 296.
Pelham v. Way, 15 Wallace 196, 201-202.
Pike v. Wassell, 94 U. S. 711.

Our contention is that under Act No. 71 of the Acts of 1895, the jurisdiction and authority of the Circuit or Chancery Court to decree sales of the lands proceeded against, in the suit provided for, to collect the levee taxes, were expressly limited and confined to cases where the notice prescribed in that act had been properly given, as directed in the act, and where no answer had been filed, or, if an answer had been filed, then to cases where the decision of the court, on the final hearing as to the person answering, or the land embraced in the answer, was in favor of the St. Francis Levee District, and against such owner, or his land, and that the fact of the notice having been given, as required, must be established as a condition precedent in order to fix the lien on the land, or authorize the decree of sale.

Acts of 1895, pp. 89, 91.

In Gregory v. Bartlett, 55 Ark. 30, the court said, in discussing the overdue tax act in question there (Acts of Arkansas of 1881, No. 39, p. 63), which in the particular now being considered does not differ in substance from Act No. 71 of the year 1895, in question here: "We are not embarrassed by the consideration of the question whether jurisdiction to sell may not be acquired by seiz-

ure of the lands without other notice, as was indicated in Field v. Dortch, 34 Ark. 399.

Under the act in question, no actual seizure is contemplated, and there is nothing for the jurisdiction of the court to rest upon, except the notice by publication.

McCarter v. Neil, 50 Ark. 188.

Without the statutory notice, therefore, there can be no jurisdiction. If the clerk makes the warning order, as the second section of the act requires, but fails to publish or post it, and that fact appears in the judgment record, there could be no justifiable pretense of jurisdiction."

55 Ark., p. 33.

This ruling was followed by this court in Dick v. Foraker, 155 U. S. 404, where a large portion of the opinion in Gregory v. Bartlett was copied and approved, including the portion we have copied, and the further statement: "No process was ever issued in the cause in which the challenged decree was rendered. The court's determination of any question was, therefore, *coram non judice*, and binding upon no one."

155 U. S., p. 413.

In Galpin v. Page, 18 Wallace 366, after a very full examination of the principles applicable, and stating a number of propositions which have become axioms, this court said: "The extent of the special jurisdiction, and the conditions of its exercise over subjects or persons, necessarily depend upon the terms in which the jurisdiction is granted, and *not* upon the rank of the court upon which it is conferred. Such jurisdiction is not, therefore, the less to be strictly pursued, because the same court may possess over other subjects, or other persons, a more extended and general jurisdiction."

It then stated that the party in the case before it was shown in the record to have been beyond the reach of the

process of the court; that is, a non-resident of the State, and said: "All presumption of jurisdiction over her person by the district court, which otherwise might have been indulged, is thus repelled, and it remains for the defendant to show that by the means provided by statute such jurisdiction was obtained."

18 Wallace 372.

After the statement last quoted, the court stated that the statute in question required the order of the court, or a judge, before the publication of notice to an absent and non-resident defendant could be made, and prescribed the facts which were required to exist to authorize the order, and also the manner in which the facts were to be made to appear, the period for which the publication was to be made, and the mode in which the publication was to be established, and then said:

"These provisions, as already stated, must be strictly pursued, for the statute is in derogation of the common law. And the order which is the sole authority for the publication, and which, by statute, must prescribe the period, and designate the paper in which the publication is to be made, should appear in the record, with proof of compliance with its directions, unless its absence is supplied by proper averment. If there is any different course of decision in the State, it could hardly be expected that it would be followed by a Federal Court, so as to cut off the right of a citizen of another State from showing that the provisions of the law by which the judgment has been obtained against him have never been pursued."

18 Wallace 372-373.

In Noble v. Union River Logging R. R., 147 U. S. 165, the court took the distinction between cases where the jurisdictional facts do not exist, and cases presenting the absence of facts *quasi* jurisdictional, or jurisdictional only in a qualified sense.

In the first class, the judgments or decrees are void. In the second class, erroneous, or voidable only.

As an example of this last class, Des Moines Navigation Co. v. Iowa Homestead Co., 123 U. S. 552, was referred to. The court classed as cases presenting *quasi* jurisdictional facts, such as present facts "which are necessary to be alleged and proved, in order to set the machinery of the law in motion, but which, when properly alleged and established to the satisfaction of the court, cannot be attacked collaterally."

It said: "With respect to these facts, the finding of the court is as conclusively presumed to be correct as its finding with respect to any other matter in issue between the parties."

147 U. S. 172-175.

And see what Dallas, Judge, said in Eltonhead v. Allen, 119 Fed. Rep. 127.

Scott v. Pleasants, 21 Ark. 364.
Bloom v. Burdick, 1 Hill (N. Y.) 138-143.
Wright v. Douglass, 10 Barbour (N. Y.) 110-111.

The court in Gregory v. Bartlett, 55 Ark., p. 35, distinguished Scott v. Pleasants from the case before it.

The same distinction in substance had been taken in Elliott v. Piersol, 1 Peters 328. There the court said:

"Where a court has jurisdiction, it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court. But if it acts without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void, and form no bar to a recovery sought, even prior to a reversal in opposition to them. They constitute no justification, and all persons concerned in exe-

cuting such judgments or sentences are considered in law as trespassers."

And further: "This distinction runs through all the cases on the subject, and it proves that the jurisdiction of any court, exercising authority over a subject, may be inquired into in every other court, when the proceedings of the former are relied on, and brought before the latter by the party claiming the benefit of such proceedings."

1 Peters 340-341.

In Williamson v. Berry, 8 Howard 495, the court said: "We concur that neither orders nor decrees in chancery can be reviewed as a whole in a collateral way. But it is an equally well settled rule in jurisprudence that the jurisdiction of any court, exercising any authority over a subject, may be inquired into in every other court, when the proceedings in the former are relied upon and brought before the latter by a party claiming the benefit of such proceedings. The rule prevails whether the decree or judgment has been given in a Court of Admiralty, Chancery, Ecclesiastical Court, or Court of Common Law, or whether the point has arisen under the laws of nations, the practice in Chancery, or the municipal laws of States."

8 Howard 540-541.

Ater referring to the older cases, the court said further: "The operation of every judgment depends upon the jurisdiction of the court to render it. Though there may be jurisdiction for certain purposes in a cause, that jurisdiction may be exceeded in the judgment. And whenever the right to property is claimed to have been changed under a judgment or decree by a court, and it is set up as a defense in another court, the jurisdiction of the former may be inquired into.

The rule is that where a limited tribunal takes upon itself to exercise jurisdiction which does not belong to

it, its decision amounts to nothing and does not create a necessity for an appeal. Attorney General v. Lord Hotham, Turner & Russell, 219."

8 Howard 543.
And see Windsor v. McVeigh, 93 U. S. 282-284.

In Guaranty Trust Co. v. Green Cove R. R., 139 U. S. 137, after referring to Cooper v. Reynolds, 10 Wallace 108, and explaining it, and quoting a part of what we have quoted from Williamson v. Berry, the court said: "The decisions of this court upon this subject, beginning in the year 1794, with the case of Betsy, 3 Dallas, p. 6, have been consistent and uniform."

139 U. S. 146-147.

Cooper v. Reynolds, and Ludlow v. Ramsey, 11 Wallace 581, which followed it, arose in Tennessee, and each involved the validity of a sale under a judgment in a suit, in a court of that State, where there was no personal service, or appearance, but an *ancillary* writ of attachment was sued out, and levied on land. The land was sold under the judgment in the suit, and title was claimed by the purchaser under the sale. The effect of the judgment and the sale under it manifestly was a matter of State law. By the law of the State a defendant whose property was attached under an *ancillary* attachment could not be brought before the court by the publication of a notice, and such a notice as to such a defendant was simply void. It was also the established law that a writ of attachment, sued out upon an affidavit which did not contain the facts required in the statute prescribing the affidavit, was not a sufficient basis for the order of publication, and that a judgment of sale, rendered in a case where the affidavit was insufficient, was simply void. The sales of the lands in Tennessee were wholly worthless, and yet, in each case, the sale was sustained, the judgment of the Circuit Court of the United States being reversed. This was the result of the court mistaking the law of

Tennessee (10 Wallace 320-321 and 11 Wallace 588), as the following cases and many others show:

Maples v. Tunis, 11 Humphreys 108.
Ingle v. McCurry, 1 Heiskell 26.
Maxwell v. Lea, 6 Heiskell 247.
Walker v. Cottrell, 6 Baxter 257, 264-270.
Bains v. Perry, 1 Lea 37.
Haynes v. Powell, 1 Lea 347.
Byram v. McDowell, 15 Lea 381.

In Pennoyer v. Neff, Justice Field, who had dissented in Cooper v. Reynolds, referred to that case, and stated what it was (95 U. S. 724-726), and then quoted that portion of the opinion delivered by Justice Miller, declaring the effect of a personal action, against an absent party, without the jurisdiction of the court, not served with process, or voluntarily submitting to the tribunal, when it was sought to subject his property to the payment of a demand of a resident plaintiff. He said that the opinion of Justice Miller was a clear statement of the law, as to the efficacy of such actions, and the jurisdiction of the court over them. After the quotation from the opinion of Justice Miller, he said further that, though the defendants in that suit had fled from the State, and were not non-residents, the opinion treated them as without the territorial jurisdiction of the court, and that the grounds and extent of the court's authority over persons and property, thus situated, were considered, when they were not brought within the court's jurisdiction, by personal service, or voluntary appearance.

As already seen in what we have stated above, Cooper v. Reynolds, treated the lands of the defendant in the suit as having been lawfully attached for the purposes of the suit, and therefore within the jurisdiction of the court in the suit (Field v. Dortch, 34 Ark. 399), and the notice by publication to the defendant in the suit as having been lawfully made, and being only a step in the suit, and upon this basis, what Justice Miller said as copied, was rested, as was also the concurrence of Justice Field in the statement quoted.

Justice Field said, finally, that in Cooper v. Reynolds, he considered some of the objections to the preliminary proceedings in the attachment well taken, and dissented from the judgment of the court, but to the doctrine as declared in what he copied, he and the other judges agreed.

95 U. S. 726.

See Voorhees v. Bank of U. S., 10 Peters 449, and Applegate v. Lexington v. Carter County Mining Co., 117 U. S. 255, on the necessity of the court's having possession of the property proceeded against.

We fully recognize the difference between such cases as Boswell v. Otis, 9 Howard 336; Bischoff v. Wethered, 9 Wallace 812, Hart v. Sansom, 110 U. S. 151, and Dull v. Blackman, 169 U. S. 243, on the one side, and Arndt v. Griggs, 134 U. S. 316; Lynch v. Murphy, 161 U. S. 247, and Leigh v. Green, 193 U. S. 89, on the other, though it is difficult in many cases to apply the distinction.

Referring to Hart v. Sansom, and Arndt v. Griggs, the court said, in Roller v. Holly, 176 U. S. 405: "The substance of these cases is that if the plaintiff be in possession, or have a lien upon land within a certain State, he may institute proceedings against non-residents to foreclose such lien, or to remove a cloud from his title to the land, and may call them in by personal service outside of the jurisdiction of the court, or by publication, if this method be sanctioned by the local law."

McLaughlin v. McCrory, 55 Ark. 442, was based on Hart v. Sansom, and Arndt v. Griggs. It only decided that a court of equity in Arkansas, under its statutes, may bring non-residents before it by publication of notice, in order to adjudicate and quiet the titles to lands locally there, and, in such cases, may, by its decrees, operate upon the lands substantially *in rem*. Ormsby v. Ottman, 85 Fed. Rep. 492, is to the same effect. Leigh v.

Green involved the collection of the State's ordinary public taxes, and was where the State authorized the sale of land for such taxes upon proceedings to enforce a lien for the payment of them, and the owner was unknown, and the court held that the State might proceed directly against the land within its jurisdiction, or authorize others to do so, upon a notice to all interested. In that case the court said, after referring to a number of cases: "The principles applicable, which may be deduced from the authorities, we think lead to this result: Where the State seeks directly, or by authorization to others, to sell lands for taxes, upon proceedings to enforce a lien for the payment thereof, it may proceed directly against the lands within the jurisdiction of the court, and a notice which permits all interested who are 'so minded,' to ascertain that it is to be subjected to sale, to answer for taxes, and to appear and be heard, whether to be found within the jurisdiction or not, is due process of law, within the Fourteenth Amendment to the Constitution."

193 U. S. 92-93.

Neither the Act No. 19, of the Acts of 1893, nor the Act No. 71, of the Acts of 1895, nor any other act of the General Assembly, provides for any actual seizure of, or levy upon, the lands charged with the assessments for the levee taxes, in the suit provided for, for the collection of those taxes.

Act No. 71, of the Acts of 1895, prescribes the notice to be given the owners of the lands, and the form of the notice, and, as a condition of the decree to be rendered in the suit, for the sale of the lands proceeded against, provides: "And in all cases where *notice has been properly given*, as aforesaid, and where no answer has been filed, or, if filed, and the cause decided for the plaintiff, the court, by its decree, shall grant the relief as prayed in the complaint and shall direct said commissioner to sell the lands described in the decree."

Acts of 1895, p. 91.

The general statute provides (Sandels & Hill's Digest, Sec. 5886, Kirby's Digest, Sec. 6263): "No lien on the property of the defendant constructively summoned shall be created otherwise than by an attachment, as provided in Chap. 9, Attachments, or by judgment."

Another statute provides: "No personal judgment shall be rendered against a defendant constructively summoned, or summoned out of this State, as provided in Section 5677, and who has not appeared in the action." (Sandels & Hill's Digest, Sec. 5887, Kirby Digest, Sec. 6264.) No attachment in the suit for the levee taxes was issued, or was levied, on the lands of A. B. Ballard and Josephine W. Ballard. Substantially, therefore, the statute has made the proceedings in the suit authorized, and the efficacy of the lien declared upon the land proceeded against, to depend upon the validity of the assessment of the levee taxes, and the fact of the notice having been properly given in the suit, as required, and the decree of sale having been properly made in the suit based on such notice. (Heine v. The Levee Commissioners, 19 Wallace 655, 659.) The making of the assessment of the levee taxes a lien in the nature of a mortgage on the land (Sec. 10, Acts of 1893, p. 30), and the foreclosing of that lien, so as to give the effect of a mortgage (Acts of 1895, Sec. 2, p. 92), only emphasized the necessity for notice to the owner of the land proceeded against.

It was not intended in the statute that the name of any owner of lands, or any one having an interest in the lands proceeded against, should appear in the list of the defendants. But the names of such persons were to be included in the body of the notice, and were to be indicated by being written or printed opposite his or her or its lands in the subjoined list of lands embodied in the notice. (Acts of 1895, pp. 89-90.) Thus, the owner or person interested, when he saw the notice, could have no difficulty in determining what lands he, or she, or it, owned, or was inter-

ested in, or the purpose for which he, she, or it, was brought before the court in the suit.

See Brodie v. Skelton, 11 Ark. 120.

The General Assembly having prescribed the form, its command was peremptory, and neither the Board of Directors of the St. Francis Levee District, nor the clerk of the court in which the suit was brought, nor the court itself, had any authority to deviate from such form in giving the required notice. If the form was not allowed, the notice was not given as provided for in the statute. No liberality of interpretation or construction can be resorted to as to statutes providing for the bringing before the court, in a suit specially authorized, of the persons whose interests may be disposed of in the suit, and who cannot be given notice of such suit, personally.

In this case the designation of the defendants as "Delinquent Lands" would have been much more likely to attract the attention, and suggest the possible interest of A. B. Ballard and Josephine W. Ballard, or those to whom the notice was directed, having lands in Crittenden County, as a suit they might have an interest in, or be concerned with, than the designation of the defendants to the suit by name, as "The Memphis Land and Timber Company and others," thereby indicating merely that particular corporations, or particular persons, were concerned, and that the suit was simply a personal suit, between the plaintiff on the one side and the defendants named on the other. The cloaking of the object of the suit was contributed to by omitting any mention of "Delinquent Lands," the term used in the statute, as representing all the persons and corporations owning the lands, or having interests in them, and simply naming some, or all of those persons or corporations.

A. B. Ballard and Josephine W. Ballard had no connection with the Memphis Land and Timber Company, and nothing was contained in the caption of the complaint

stating the names of the defendants (Record, pp. 9-11), or in any notice, if following the statutory form (Acts of 1895, pp. 91-92), as given or published in that case, connecting them, or their lands, with any of the persons or corporations, or suggesting or tending to suggest to A. B. Ballard or Josephine W. Ballard an investigation as to what the notice referred to, or what the object of the suit was. The decree of the 14th of February, 1898, in the suit, ordering the sale of the lands of A. B. Ballard and Josephine W. Ballard (Record, p. 16) shows that the Memphis Land and Timber Company, the first defendant named in the complaint, and in the decree, and probably the only defendant named in the caption of the notice of the suit in the newspaper, if any notice, or warning order, was in fact published, did appear in the suit and did make defense. If A. B. Ballard and Josephine W. Ballard had been named, they probably would have done the same thing, or, at least, might have done the same thing, as their attention, or the attention of some one knowing or concerned in them, might have been attracted to the notice. It may well be said that the notice, if published in the suit as styled, as the style appears in the record, was misleading, and may have prevented or deterred A. B. Ballard and Josephine W. Ballard from being informed of, or learning, the fact of the pendency of the suit, or the fact that they were concerned in the suit, or that their lands were involved, when a notice given in the form prescribed by the statute might have brought to them the information necessary. See the case of Marx v. Hanthorn, 148 U. S. 172, where the doctrine that an incorrect notice is misleading was applied, and the notice was held to be invalid.

See 148 U. S. 183-184.

The number of defendants indicated by the complaint and the decree, and the fact that all the lands subject to levee taxes in Crittenden County—possibly several thousand distinct tracts—may have been proceeded against

in the one suit, sufficiently indicate the extent and magnitude of the notice, and the utter improbability of its attracting the attention of A. B. Ballard and Josephine W. Ballard, the one in Florida and the other in Georgia, when published only in a weekly country newspaper, such as was published at the time in Crittenden County, and the name of one was not mentioned at all, and the name of the other was included among more than two hundred other names.

In Brodie v. Skelton, 11 Ark. 120, the statute required only that the order published to non-resident defendants state in general terms the nature of the complaint. The object of the bill filed, as set forth in the order published, was to correct a mistake in a deed of trust, and also to appoint a new trustee, but the scope and purpose of the bill was, not only to correct the mistake and appoint the trustee, but also to divest titles and correct deeds, and thus vitally to affect the rights not appearing in the order published.

The court said: "If their rights were sought to be thus vitally affected, there can be no doubt but that they were entitled to be apprised of it, so that they could be prepared to make their defense, and, if possible, prevent so great a calamity. The object of the bill, as set forth in the order, was well calculated to mislead and lull them into a false security, and, consequently, could not be sufficient to meet the requirements, and answer the end of the law."

11 Ark., p. 130.

And see Saffold v. Saffold, 14 Ark. 408, 409-411.

The provisions of the statutes, Acts of 1893, No. 19, and 1895, No. 71, and all the others on the same subject, as to the method of procedure and notice, and other like matters, are mandatory, and must be shown in this suit to have been observed technically and literally, as well as substantially, as a condition precedent to the attachment

of the lien on the lands of A. B. Ballard and Josephine W. Ballard, and the other lands assessed, and to the power to decree a sale of such lands for the payment of the levee taxes sued for, and to the right to have the lands sold for the taxes, and if the requirements of the statutes have not been so observed, the sales of the lands of A. B. Ballard and Josephine W. Ballard are, for that reason alone, void.

Patrick v. Davis, 15 Ark. 370-371.
Wiley v. Flournoy, 30 Ark. 612.
Matter of Will of Cornelius, 14 Ark. 682.
Abraham v. Wilkins, 17 Ark. 319-320.
Rector v. Board of Improvement, 50 Ark. 116.
Watkins v. Griffith, 59 Ark. 344.
Torrey v. Millbury, 21 Pickering 640.
Sandwich v. Fish, 2 Gray (Mass.) 298, 301.
Clark v. Crane, 5 Michigan 154.
French v. Edwards, 13 Wallace 506, 511.
Lyon v. Alley, 130 U. S. 178, 184, etc.
Gregory v. Bartlett, 55 Ark. 30.

And see Heine v. Levee Commissioners, for a decision of the question when taxes become liens.

19 Wallace 655.

The record of this suit wholly fails to show that any notice whatever was given to A. B. Ballard or Josephine W. Ballard, or to anybody, of the pendency of the suit in which the lands in controversy were sold for the levee taxes.

No notice, or warning order, appears in the record, and no order appears there directing the giving of any notice, or the publication of any warning order. The clerk of the Chancery Court of Crittenden County appended a certificate of the record, as it went up to the Supreme Court, that the pages he sent up, and to which he attached his certificate, contained a true and complete transcript of the records, proceedings and papers in the case of the Board of Directors of the St. Francis Levee District v. The

Memphis Land and Timber Company, and others, and in the matter of the controversy between A. B. Ballard and others, and A. Hackler and others, as therein set forth, and as the same appeared of record and on file in his office. (Record, pp. 78-79.)

Under the established law of Arkansas, the record is complete, and the court cannot go outside the record for facts, but must determine the case upon the facts in the record.

Stayton v. Newcomer, 6 Ark. 451.
Merrick v. Kimball, 20 Ark. 12.
Memphis Land and Timber Co. v. The Board of Directors of the St. Francis Levee District, 70 Ark. 409.
Gregory v. Bartlett, 55 Ark. 30.

In the Crittenden Chancery Court, under the stipulation of the parties, the cause was presented and heard as an agreed case, upon an agreed statement of facts filed in the cause, and the evidence referred to in that agreement. (The word "appeal" is used in place of the word "agreed" in the stipulation as copied in the Minute Book.) (Record, pp. 37, 38.) Under the agreement as made (Record, p. 40), the original complaint and all amendments, the warning order, or order of publication, the proof of the publication, the summons or other process issued, and the returns on all process, the publications of warning orders, or notices made in the newspaper, and the pleadings and proceedings in the suit, including all the orders, judgments and decrees, and any and all reports of sales and deeds made by the commissioner, having reference to the lands of A. B. Ballard and Josephine W. Ballard, were parts of the record for the purposes of the present controversy, subject only to objections for irrelevancy and incompetency, and either party had the right, if the original record, process, pleading, proof, proceeding, or other paper, or record, could not be found, to use in evidence, in the place of the original, true copies thereof, with the like effect.

Our claim is that the record of this suit must show notice affirmatively, given according to the statute, to A. B. Ballard and Josephine W. Ballard, or the conclusion follows that no notice was given. But, waiving this position for the present, this record shows affirmatively that no such notice as that required by Act No. 71, of the Acts of 1895, could have been given in this case. That act declares that notice of the pendency of the suit shall be given as against non-residents of the county, when the suit is pending, by publication weekly, for four weeks prior to the day on which final judgment may be entered, for the sale of the land, in some newspaper published in the county, and then says, "which public notice may be in the following form." Under the law applicable in this class of cases, the meaning of the statute is that the notice "shall be in the following form," and no departure from the form is admissible.

Rex and Regina v. Barlow, 2 Salkeld 609.
Mason v. Fearson, 9 Howard 248, 258-260.
Potter's Dwarris on Statutes and Constitutions, p. 220.
Newburgh T. P. Co. v. Miller, 5 Johnson's Ch. 113.
Malcolm v. Rodgers, 5 Cowen, 193.
Gregory v. Bartlett, 55 Ark. 34.

The statute not only made the substance of the notice a part of the form prescribed, but actually prescribed the style of the suit in which the notice should be given, and did so in these words:

"St. Francis Levee District
v. Notice.
Delinquent Lands."
Acts of 1895, p. 89.

The style of the case, therefore, as well as the contents of the notice, has been made statutory.

The notice, as prescribed in the statute (Acts of 1895, pp. 89-90), did not mention the term of the court at which the persons notified were required to appear and make

defense, nor state the time within which they were required to appear and make defense, but did state that the suit was pending in the Circuit (Chancery) Court of—— County, Ark. Below the form of the notice in the statute and on the same page it was provided that the suit should stand for trial *at the first term* of the court after the complaint had been filed, if four weeks in the case of a non-resident or unknown defendant, or twenty days in the case of a resident defendant, expired either before the first day of the term, or during the term to which the suit had been brought, unless a continuance was granted; and on the preceding page, in prescribing the notice, the statute declared that it should be by publication weekly, in some newspaper published in the county, for four weeks prior to the day of the term of court on which final judgment might be entered for the sale of the land. And the statute required the court, in all cases where the notice had been properly given (p. 91) and no answer had been filed, or if filed and the cause had been decided for the plaintiff, by its decree to grant the relief prayed by the complaint, and to direct the sale of the land.

The third Monday of January, 1898, which was the first day of the January term, 1898, of the Crittenden Chancery Court (Acts of Arkansas of 1897, Extra Session, p. 90), was the 17th day of January, 1898. The complaint was filed on the 21st day of December, 1897 (Record p. 14). Between those dates there were twenty-seven days. The same chancellor who held the Chancery Court of Crittenden County also held the Chancery Court, at prescribed times, regularly, in ten other counties, twice a year. The Chancery Court of Mississippi County, immediately preceding that of Crittenden, was held on the first Mondays in January and July of each year. The Chancery Court of Cross County, immediately following that of Crittenden, was held on the first Mondays in February and August of each year. The other counties of the Chancery District followed Cross in regular order (Acts of Arkansas of 1897, Extra Session,

p. 93). Giving the term of the Chancery Court of Crittenden County the two weeks allowed by law, it terminated on the 29th day of January, 1898. The decree of sale in this case was not rendered during that term, but on the 14th day of February, 1898 (Record p. 14), which was during the second week of the February term, 1898, of the Cross County Chancery Court, as fixed by law.

Nothing in the record shows that there had been any appearance in the suit during the January term, 1898, of the Crittenden Chancery Court, nor any order of the court postponing or continuing the case beyond the January term, or until the 14th day of February, 1898, or any order fixing that day for the holding of a special term of the court.

The general statute provides: "Special adjourned sessions of any court may be held in continuation of the original term upon its being so ordered by the court or the judge in term time, and entered by the clerk on the record of the court." Sandel's & Hill's Digest, Sec. 1307; Kirby's Digest, Sec. 1531. Under this statute it has been held to be essential to the jurisdiction of the court, sitting upon an adjournment, that the entry by the clerk on the record of the court of the order of the court, the order of the judge making the adjournment be, in fact, made.

Dunn v. The State, 2 Ark. 229, 252, etc.
Pulaski County v. Lincoln, 9 Ark. 320, 326, etc.
Galbreath v. Mitchell, 32 Ark. 278.
Crain v. The State, 45 Ark. 450, 453, etc.
State v. Williams, 48 Ark. 228.

It has frequently been held also that a court held at any time, or at any place, not authorized by law, can exercise no lawful jurisdiction, and that its proceedings and judgments are simply void.

Lawson v. Pulaski County, 2 Ark. 15.
Brumley v. The State, 20 Ark. 77.

Osborn, *ex parte*, 24 Ark. 479.
Chaplain v. Holmes, 27 Ark. 417.
Graham v. Parham, 32 Ark. 687.
Grimmett v. Askew, 48 Ark. 155.
State v. Williams, 48 Ark. 227.
Jones, *ex parte*, 49 Ark. 110.
Parr v. Matthews, 50 Ark. 390.
Street v. Reynolds, 63 Ark. 4.
Ex parte Williams, 69 Ark. 459.
Berger v. Lutterloh, 69 Ark. 576.
Caldwell v. Barrett, 71 Ark. 310.

The statute prescribed that the suit for the levee taxes should stand for trial as to non-resident defendants at the first term of the court after the complaint was filed, if the four weeks of publication of the notice had expired. The complaint, as we have seen, was filed on the 21st day of December, 1897. The third Monday of January, 1898, the 17th day of that month, was the beginning of the next term of the Chancery Court of Crittenden County in which the suit was brought. The four weeks of publication of the notice expired in the first week. That term endedby law on the first Monday in February, which was the beginning of the term of the Chancery Court of Cross County. It ended, therefore, before the 14th day of Februaw, 1898, the day on which the decree of sale was entered. The notice, therefore, if published under the statute taken in connection with the requirements of the statute, was that appearance and defense must be made at the January term, and not only gave no notice to those to whom it was directed that the decree might be entered on the 14th day of February, 1898, but, in effect, gavenotice that no such thing could be done. The notice, therfore, was misleading, and in reality no notice that the decree of sale would be entered *when* it was entered. It was no notice at all of *any time* when the decree would be entered. The decree of sale of the 14th of February, 898, was, therefore, void for want of notice as to A. B Ballard and Josephine W. Ballard.

Aller v. Ozark Land Company, 55 Arks. 549.

Hogins v. Brashears, 13 Arks. 251.
St. Louis & S. F. Ry. Co. v. Holton-Warren L. Co., 61 Arks. 50.
Chaplin v. Holmes, 27 Arks. 417-418.
Parr v. Matthews, 50 Arks. 390.
Grimmett v. Askew, 48 Arks. 151.
Baskins v. Wylds, 39 Arks. 347.

The prayer of the complaint was that the warning order require the defendants to answer at the next January term of the court. (Record p. 13.)

If the Chancery Court of Crittenden County was lawfully adjourned during the January term, 1898, to the 14th day of February, 1898, when the decree of sale was entered, it did not follow that the notice, if given according to the requirements of the statute (Acts of 1895, No. 71), required A. B. Ballard and Josephine W. Ballard to appear on the 14th day of February, 1898, and make defense to the suit against their lands. The law, in such cases, requires a literal and exact compliance. If A. B. Ballard and Josephine W. Ballard were given notice to appear during the January term, 1898, of the Crittenden Chancery Court and make defense, they could not lawfully be required to appear and make defense on the 14th day of February, 1898, and the decree of sale taken against them on that day was without jurisdiction and void.

In Black on Tax Titles, Section 61, it is stated: "Where the statute prescribes that judgments against lands for delinquent taxes shall be rendered at a specified term of the court, this provision is peremptory and not merely directory, and an application and judgment at a different term will not be sustained. A judgment and sale under such circumstances is void."

And Judge Cooley, in his work on Taxation (1st Ed.), Chapter 15, page 361, in specifying the cases in which errors and imperfections have been held to render judi-

cial proceedings in the sales of lands for unpaid taxes void, includes among them "applying for and obtaining judgment at a different term from that at which the statute requires the application to be made."

See Baskins v. Wylds, 39 Ark. 347.

Conceding that A. B. Ballard and Josephine W. Ballard were among those stated in the decree of the 14th of February, 1898, to have been "severally, constructively, summoned by publication in a newspaper" (which certainly is not true as to Josephine W. Ballard), the same decree shows (Record p. 16) that they had failed to appear or make defense, and thus establishes the fact that they did not appear in court in consequence of the notice.

The statute gave no power to the court to adjourn or postpone the hearing beyond the term next after the filing of the complaint where the owners of the lands proceeded against, or those having interests in the lands, did not "appear and make defense."

The court had no power, under the statute, had it undertaken to do so, to make an order at the January term, 1898, obliging A. B. Ballard and Josephine W. Ballard, who did not then appear in the suit, to appear and make defense with respect to their lands on the 14th day of February, 1898, after the January term, 1898, of the court had ended. Hudson v. Jefferson County, 28 Arks. 360; Grimmett v. Askew, 48 Arks. 155. The fact is, it made no such order, and it had not even the color of such an order for requiring appearance and defense on that day, or for entering the decree of sale as against them on that day, because they failed to appear or make defense.

The court below took no notice of the proposition presented and fully argued before it, that notice in the suit

for the levee taxes was required, or the proposition that notice had to be established by the record of the suit, or the proposition that the decree of sale without the notice was a nullity; but assumed, if we understand the opinion (record, pp. 82-83), that A. B. Ballard and Josephine W. Ballard were obliged, without notice—actual or constructive, as a matter of law—to know of the enactment of Act No. 19 of the Acts of 1893, and Act No. 71 of the Acts of 1895, and of the assessment of the levee taxes against their lands under those acts, and of the present suit to recover those taxes, and not having appeared and made defense, the decree of sale concludes them.

It cited as authority only the case of Johnson v. Hunter, 127 Fed. Rep. 219, which, at the time it was cited, was on appeal from the Circuit Court of the United States for Arkansas, to the Circuit Court of Appeals of the United States for the Eighth Circuit, and the decree was reversed by that court, and a decree rendered in favor of the appellants, Johnson and others, in August last. A copy of the opinion will be before this court on the hearing of this cause.

It was argued by the counsel for Hunter and others in the court below, and will no doubt be here, that the recital in the decree of sale (record, p. 16), to the effect that all the defendants, naming A. B. Ballard (but not Josephine W. Ballard) among them, who had been "severally, constructively, summoned by publication in a newspaper, published in Crittenden County, Arkansas, weekly for four weeks before this day, proof of which has been previously filed herein, and all of the above named defendants * * * having failed to plead, answer or demur to the complaint of the plaintiff, the court, on motion of the attorney for the plaintiff, awards a decree *pro confesso* as to them, in favor of the plaintiff, for the amount of the taxes, interest, penalty and costs due for their said lands," establishes notice to A. B. Ballard and Josephine W. Ballard of the suit, and estops them from raising, or

presenting, the question of notice on the hearing of this cause.

We wholly deny the correctness of the proposition.

The court below took no notice of the statute (Sandels & Hill's Digest, Sec, 5882, Kirby's Digest, Sec. 6259), providing that where a judgment has been rendered against a defendant or defendants constructively summoned, and who did not appear, such defendants, or any one or more of them, may at any time within two years—and not thereafter—after the rendition of the judgment, appear in open court and move to have the action retried, and security for the costs being given, such defendant or defendants shall be permitted to make defense. And thereupon the action shall be tried anew as to such defendant or defendants, as if there had been no judgment. And upon the new trial the court may confirm, modify or set aside the former judgment, and may order the plaintiff in the action to restore to any such defendant or defendants any money of such defendant paid to them under such judgment, or any property of such defendants obtained by plaintiff under it, yet remaining in his possesion, and pay to the defendant the value of any property which may have been taken under an attachment in the action, or under the judgment and not restored.

We insist that the statute entitles A. B. Ballard and Josephine W. Ballard to have the action "tried anew as to such a defendant or defendants (them) as if there had been no judgment."

We claim that this present writ of error (as was the appeal to the Supreme Court of Arkansas from the decree of sale of the Crittenden Chancery Court) is in the original suit in which the decree of sale was rendered, and that that suit in its entirety was before the Supreme Court of Arkansas by the appeal, and is before this court

on the writ of error, for adjudication, as to all the rights and remedies of A. B. Ballard and Josephine W. Ballard.

But, treating the writ of error now here as a collateral attack on the decree of the Chancery Court of Crittenden County of the 14th of February, 1898, for the sale of the property of A. B. Ballard and Josephine W. Ballard, it is not true that any fact appears in the record, or that the record contains any recital establishing that that court had jurisdiction to render that decree.

The furthest the decisions of the courts entitled consideration as authority have gone in support of the jurisdiction of courts over the subject matter and parties to suits, is to hold that where the court rendering the judgment or decree is a superior court of record, of general jurisdiction, proceeding in the usual way, according to the ordinary course of courts of law, or courts of chancery in suits before them, and the subject matter is within the jurisdiction of the court, and nothing appears in the record showing a want of jurisdiction over the subject matter, or the parties, then, when the decree or judgment of such court is called in question in another court, there is a presumption that the court had jurisdiction, both of the subject matter and the parties, and that its judgment or decree was rendered within its jurisdiction, and it is immaterial whether the facts showing the jurisdiction are affirmatively recited in the record or not. The cases go no further than the proposition stated.

Borden v. The State, 11 Ark. 519.
Boyd v. Roane, 49 Ark. 397.
McLaughlin v. McCrory, 55 Ark. 444.
McLain v. Duncan, 57 Ark. 50.
McConnell v. Day, 61 Ark. 464.
Smith v. White, 63 Ark. 513.
Vorhees v. Bank of U. S., 10 Peters 449.
Harvey v. Tyler, 2 Wallace, 342.
Secombe v. Railroad Co., 23 Wallace 109.
Applegate v. Lexington & Carter Co. Mining Co., 117 U. S. 255.
Shields v. Coleman, 157 U. S. 169, 182-183.

But there are exceptions to the rule just stated, just as well established as the rule itself, and the recitals in the record of the jurisdictional facts are wholly impotent to establish the jurisdiction, when, as a matter of fact, it really did not exist.

Thus, if it appears, taking the record as a whole (and the whole record must be before the court, and not the record of the judgment or decree alone), (1) that the court had not the jurisdiction of the subject matter; or (2) had not the jurisdiction of the parties, or some particular party, whose interest was disposed of; or (3) was proceeding in the suit outside its established jurisdiction; or (4) was proceedings in ways or by methods not according to its admitted jurisdiction; or (5) was proceeding against parties shown by its record not to be within its jurisdiction for the personal service of process, and to have been brought before the court for the purposes of the suit by published notice, or constructive service of process; or (6) where it appears that the court was not proceeding according to the usual course of a court of common law, or a court of equity in the suit, but was proceeding, under some special statutory authority, in the exercise of powers specially conferred, and to be exercised upon prescribed conditions; then no presumption attaches in any such case that the court had jurisdiction, either of the parties or of the subject matter, or was proceeding within its jurisdiction, but those facts must be established, outside its record, and independently of it, and it is immaterial in such cases what the record states.

In the State v. Hill, 50 Ark. 461, Chief Justice Cockrill stated that the general rule that the statement or recital in a judgment or decree of a domestic superior court of general jurisdiction of service of process, or of the appearance of the parties, when brought before a court of the same jurisdiction, shall not be contradicted, but shall be conclusive upon the parties to the suit, and their privies, upon the subject of jurisdiction, is merely a rule of

public policy, adopted for the correct administration of justice in the local courts, and yields to the equitable principle, that one who is guilty of no *laches* shall not be held to pay the penalty of another's fraud or mistake, if he takes prompt and proper steps to be relieved from the danger of impending injury. And upon this theory, many times, courts of equity, have relieved against domestic judgments or decrees, entirely regular on their face, where, as a matter of fact, there had been no personal service of process, though the record of the suit showed such service.

Ridgeway v. Bank of Tennessee, 11 Humphreys 523.
Bell v. Williams, 1 Head (Tenn.) 229.
Bridgeport Savings Bank v. Eldridge, 28 Conn. 556.
Bissell v. Briggs, 9 Mass. 462.
Pile, *Ex Parte*, 9 Ark. 336.
Ryan v. Boyd, 33 Ark. 778.
Kizer Lumber Co. v. Moseley, 56 Ark. 544.
McLeod v. Tisdale, 57 Ark. 354.
Marine Ins. Co. v. Hodgson, 7 Cranch 236.

The statute of Arkansas (Sandels & Hill's Digest, Secs. 4190-4191, Kirby's Digest, Secs. 4424-4425), after declaring all judgments, orders, sentences and decrees, made, rendered, or pronounced, without notice, actual or constructive, and all proceedings under them, absolutely null and void, provides that: "In all cases where it appears from a recital in the records of any such court that such notice has been given, it shall be evidence of such fact."

It is to be observed that the statute requires that it shall appear from a recital in the record *that notice has been given*, and then the recital shall be *evidence* (not proof) of such fact.

It is safe to say that the recital must be so clear and so distinct that it substantially affirms in words the fact of the giving of the notice required by the law in the particular case.

And before the recital can be evidence against A. B. Ballard and Josephine W. Ballard, of what it recites, it must be made to appear independently of the recital itself that they were parties to the suit, and before the court for the purposes of the suit, when the decree containing the recital was pronounced. For it is certainly the settled law, that no one but parties or privies are bound by, or in any way affected by, the record or proceedings in a suit.

Trammell v. Thurmond, 17 Ark. 212.
Greenstreet v. Thornton, 60 Ark. 374.
Harris v. Hardeman, 14 Howard 341.
Hollingsworth v. Barbour, 4 Peters 477.
Mutual Benefit Life Ins. Co. v. Tisdale, 91 U. S. 238.
Hegler v. Faulkner, 153 U. S. 109.
Pardee v. Aldredge, 189 U. S. 433.
Hannah v. Carrington, 18 Ark. 85.
McArthur v. Scott, 113 U. S. 388.

It would be of little value to an absent and non-resident defendant to be told that he was not bound by a judgment or decree rendered against him in his absence, if it was sufficient to bind him, that the decree so rendered declared he was present, in the court when it was rendered, and he could not contradict it.

However it may be under local rules of decision in any State, with reference to a judgment, or decree, pronounced in a court of such State against a citizen residing in the State, and subject for all purposes to its laws, it is certainly true in the courts of the United States that citizens of other States and non-residents of the State in which the suit was brought, and the judgment or decree rendered, and not personally served with process within the State, and not appearing in the suit, are not estopped by the statements or recitals in the judgment or decree, or elsewhere in the record, of the service of process on them, or of notice to them to appear, or of their appear-

ance in the suit. Notwithstanding such statements, or recitals, in the record, such judgment or decree does not estop such non-resident citizens of other States, and they may deny their truth, and if, upon the trial, it is not established affirmatively against them that the court pronouncing the judgment or decree had jurisdiction of the subject matter, and personally of them, they are not bound by the judgment or decree, and it is absolutely void as to them.

Pana v. Bowler, 107 U. S. 545.
Wilson v. Seligman, 144 U. S. 41.
Grover & Baker Sewing Machine Co. v. Radcliffe, 137 U. S. 287.
St. Clair v. Cox, 106 U. S. 350.
Owens v. Henry, 161 U. S. 642.
Cooper v. Newell, 173 U. S. 565, etc.
Thorman v. Frame, 176 U. S. 356.
Howard v. DeCordova, 177 U. S. 613.
Andrews v. Andrews, 188 U. S. 37, etc.
Barkman v. Hopkins, 11 Ark. 157.
Iglehart v. Moore, 16 Ark. 46.
Pickett v. Ferguson, 45 Ark. 192.
Needham v. Thayer, 147 Mass. 536.
Vilas v. P. & M. R. R. Co., 123 N. Y. 453, etc.
Henning v. Planters Ins. Co., 28 Fed. Rep. 440.

Thompson v. Whitman, 18 Wallace 457, is perhaps the leading case in this court upon the law, where judgments or decrees are collaterally brought in question in other suits, embracing the same subject matter, for want of jurisdiction, because process was not legally served, or sufficient notice given to the defendant in the judgment or decree.

In the very recent case of National Exchange Bank of Tiffin v. Wiley, 195 U. S. 257, where a judgment, confessed in a court of Ohio, was denied effect in Nebraska, on the ground that the power of attorney under which the judgment was confessed in the court of Ohio was not sufficient to authorize the confession, and the judgment of the Supreme Court of Nebraska so holding was af-

firmed, Justice Harlan said that there had been no departure in the decisions of this court from the doctrine announced in Thompson v. Whitman, whether the question related to courts of general, or to courts of limited, or special jurisdiction, and that that doctrine had been repeatedly affirmed, and referred to a number of the later cases.

195 U. S. 270.

The propositions decided by Thompson v. Whitman are:

1. That want of jurisdiction may always be shown, either as to the subject matter, or the person, or in a proceeding *in rem*, as to the thing.

2. That if the facts necessary to give jurisdiction did not exist, the judgment or decree is wholly void.

3. That if it be shown that the facts necessary to give jurisdiction did not exist, the record will be a nullity, notwithstanding it may recite that such facts did exist, and such recitals may be contradicted or disproved in the second suit.

The case of Ferguson v. Crawford, 70 N. Y. 253, follows Thompson v. Whitman, and contains an examination of many cases.

The decisions have formulated rules substantially as follows: If the face of the record discloses affirmatively what was done toward acquiring jurisdiction, there is no presumption that anything more was done to confer it. Hence, if the record recites such jurisdictional facts, and these are insufficient to confer jurisdiction, the authority of the court to pronounce judgment in the particular case cannot be aided by the indulgence in presumptions that such recital is incorrect, or incomplete, for the affirmation of the existence of jurisdictional facts precludes the possibility of support by way of presumptions, that otherwise would prevail, were there no re-

citals whatever in the record. If the disclosures of the record show affirmatively a want of jurisdiction, the judgment cannot be supported by any presumptions, and is a nullity. And if the entire record shows process was not served, recitals of due service of process cannot sustain the judgment.

Thus in Settlemier v. Sullivan, 97 U. S. 444, the court, in answering the contention that the recital in the judgment, that the defendant had been served with process was proof that due service had been made on him, notwithstanding the manner of the service, as shown by the return of the sheriff on the process, said: "The answer is that the recital must be read in connection with that part of the record which gives the official evidence prescribed by the statute. This evidence must prevail over the recital, as the latter, in the absence of an averment to the contrary, the record being complete, can only be considered as referring to the former."

97 U. S. 448.

In Gregory v. Bartlett, 55 Ark. 30, the decree recited that there had been proper notice to the parties in interest, but the statute under which the proceeding was had required the warning order to appear of record. The warning order did not appear of record in the suit, and the court held the judgment void, saying:

"The recital of the decree that there was proper notice to the parties in interest is not conclusive of that fact, but must be read in connection with that part of the record which gives, or is required to give, the official evidence of jurisdiction, as prescribed in the statute."

55 Ark. 35-36.
Dick v. Foraker, 155 U. S. 404, is to the same effect.

In Lusk v. Perkins, 48 Ark. 238, the judgment recited that "due and legal notice of said order had been given as required by law," but the order on which the notice

was based was in the record, and it was not sufficient to direct the giving of the proper notice, and the court held that the recital in the judgment was ineffectual, and not sufficient to support the judgment."

And see:

Brodie v. Skelton, 11 Ark. 130, 132.
Coons v. Throckmorton, 25 Ark. 60.
Cissell v. Pulaski Co., 10 Fed. Rep. 894.
Parr v. Matthews, 50 Ark. 390.
Cheely v. Clayton, 110 U. S. 708-710.
Martin v. McDiarmid, 55 Ark. 213.
Nevada County v. Williams, 72 Ark. 397.

The distinction was taken between proceedings of a superior court, in cases where it has general jurisdiction, and cases of special or statutory jurisdiction, where the court exercises summary powers, contrary to the usual course of proceedings in a suit at law, or in equity, in Gibney v. Crawford, where the court said: "As a general rule, the proceedings of a superior court, with respect to jurisdictional facts about which the record is silent, are presumed to be within the scope of its jurisdiction until the contrary is shown. But this rule does not apply to proceedings had under special statutory authority. As said by the Supreme Court of New Hampshire (Moss v. Presby, 5 Foster 302), 'A court of general jurisdiction may have special and summary powers wholly derived from statutes, not exercised according to the course of the common law, and which do not belong to it as a court of general jurisdiction.'

"In such cases its decisions must be regarded and treated like those of courts of limited special jurisdiction. The jurisdiction in such cases, both as to the subject matter and as to the persons to be affected by it, must appear. * * * And everything will be presumed to be without the jurisdiction which does not distinctly appear to be within it. In other words, the jurisdiction of the

court in such cases must be shown affirmatively to confer validity on its acts, and unless it is shown its whole proceedings will be invalid, and may be treated as a nullity when called in question in a collateral controversy."

51 Ark. 39-40.
Miller v. Farrelly, 25 Ark. 353.
Morris v. Dooley, 59 Ark. 487-488.
Pulaski County v. Stewart, 28 Grattan (Va.) 879.
Hindman v. O'Connor, 54 Ark. 627, 643.

The court said in Galpin v. Page: "The presumptions indulged in support of the judgments of superior courts of general jurisdiction are also limited to jurisdiction over persons within their territorial limits—persons who can be reached by their process—and also over proceedings which are in accordance with the course of the common law. The tribunals of one State have no jurisdiction over the persons of other States, unles found within their territorial limits. They cannot extend their process into other States, and any attempt of the kind would be treated in every other forum as an act of usurpation without any binding efficacy."

18 Wallace 367.

As a conclusion from the statement just made, the court said further: "Whenever, therefore, it appears from the inspection of the record of a court of general jurisdiction that the defendant against whom a personal judgment or decree is rendered was at the time of the alleged service without the territorial limits of the court, and thus beyond the reach of its process, and that he never appeared in the action, the presumption of jurisdiction over his person ceases, and the burden of establishing the jurisdiction is cast upon the party who invokes the benefit or protection of the judgment or decree. This is so obvious a principle, and its observance is so essential to the protection of parties without the territorial

jurisdiction of a court, that we should not have felt disposed to dwell upon it at any length had it not been impugned and denied by the Circuit Court."

18 Wallace 368.
Curtis, J., in Lafayette Ins. Co. v. French, 18 Howard 406.

Then, coming down to the particular case, the court said further: "When, therefore, by legislation of a State constructive service of process by publication is substituted in place of personal citation, and the court upon such service is authorized to proceed against the person of an absent party not a citizen of the State, nor found within it, every principle of justice exacts a strict and literal compliance with the statutory provisions. And such has been the ruling, we believe, of the courts of every State in the Union."

18 Wallace 369.

And see:

Hollingsworth v. Barbour, 4 Peters 466.
Roller v. Holly, 176 U. S. 402-407.

But giving the recital in the decree copied above (record, p. 16) all the force and effect it is entitled to, it does not prove that any notice, as required by Act No. 71 of the Acts of 1895, was published as to A. B. Ballard and Josephine W. Ballard, or their lands.

There is no similarity whatever between the warning order provided for in the statute (Sandels & Hill's Digest, Secs. 5679-5683, Kirby's Digest, Secs. 6055-6059) in suits generally, and the notice prescribed in Act No. 71 (pp. 89-90) of the Acts of the year 1895. The one is entirely different from the other—so different that the general warning order, if published in this suit, did not give A. B. Ballard and Josephine W. Ballard any part of the information they were entitled to, and would have received had the notice under Act No. 71 of the year 1895

been communicated to them. The recital is, after giving more than two hundred and fifty names, and among them A. B. Ballard (though not Josephine W. Ballard): "Were severally, constructively, summoned by publication in a newspaper, published in Crittenden County, Arkansas, weekly for four weeks before this day, proof of which has been previously filed herein." (Record, p. 16.) The decree contains nothing else, and there is nothing else in the record to which resort can be had to make the statements of the decree fuller, or more complete, or more specific.

The complaint prayed "that a warning order issue for the non-resident defendants herein named, requiring them to answer the complaint of the plaintiff at the next January term of this court."

Four weeks could not have elapsed between the 21st of December, 1897, when the complaint was filed (record, p. 14), and the third Monday (17th), January, 1898, when, according to the prayer, the warning order was to be made returnable.

Now, what were the defendants notified to do? No suit was mentioned in the publication, or in the decree, so far as the recital states, and they were not required to file any answer, or make any defense in any suit. The name of the newspaper was not even given. It was not stated that the court or the clerk had made, or had authorized, the publication in the newspaper in the suit. And the fact is, although the entry in the decree states the contrary, that there was no proof of the publication previously filed in the suit, because, as an inspection of the record shows, there is none in the record. Therefore, the contents of the publication are not made more particular, or mor complete, or more specific, by any proof filed.

The position of the court below, stated in what has been quoted above from its opinion, to the effect that the pro-

vision in the statute that the suit to recover the levee taxes, and the decree therein, shall be in the nature of proceedings *in rem*, taken in connection with the other provision that it shall be immaterial that the ownership of the lands may be incorrectly alleged in the proceedings, dispenses with any notice to any owner of any land belonging to a non-resident of Crittenden County, not within the county, and having no occupant on his land, and has had the effect of dispensing with any notice to any such a land owner, and that his title may be disposed of by the court, by its decree, in the suit absolutely, and so as to bind him, though he does not appear in the suit, and has no notice of it, we wholly deny.

In Martin v. Barbour, 34 Fed. Rep. 701, the court passed on the statutes of Arkansas, Mansfield's Digest, Secs. 5782 and 5791, the same being Kirby's Digest, Secs. 7105 and 7114, the one providing that a claimant attacking a tax deed should be required to prove that there had been an entire omission to list, or assess, the property, or levy the taxes, or to give the required notice of the sale, in order to overcome the tax title, and the other that the lapse of two years from the date of the sale should be an absolute bar in favor of the purchaser at the tax sale, or against any action to recover the property, and held that those statutes did not apply to meritorious defenses, and that by meritorious defenses was meant any act or omission of the revenue officers, in violation of law, and prejudicial to the rights or interests of the owner, as well as those jurisdictional and fundamental defects which affect the power to levy the tax, or sell for its non-payment. That case was taken, by appeal, to this court, and the court affirmed the decree of the court below.

The court below had held—and this court took the same view—that the former owner of the property had been unlawfully prevented by the acts or omissions of the officers of the State having the assessment and collection of the taxes, from the opportunity of knowing of

the sale and from redeeming the property, after the sale, within the time allowed by the law, and, also, that the purchaser was chargeable with responsibility for the conduct of the officers, and hence the former owner's right to redeem was extended.

Each court referred to the case of Radcliffe v. Scruggs, 46 Ark. 96, and based its opinion largely upon what that case decided.

The same view, in effect, was taken by the court at an early day in Walker v. Turner, 9 Wheaton 541, where it was held that a sheriff's deed, which is void for want of jurisdiction in the court, under whose judgment the sale took place, was not such a conveyance that possession under it would protect the purchaser under the statute of limitations of the State of Tennessee. And in Moore v. Brown, 11 Howard 414, it was held that the statute of limitations of Illinois, which makes a possession of seven years a bar, in favor of one having a connected title, deducible from any officer authorized by the laws of the State to sell such land for the non-payment of taxes, does not include a case where the deed from an officer is void on its face, because the requirements of the law were not observed in making the sale, and the officer had no authority according to the recitals in the deed to make the sale.

In Redfield v. Parks, 132 U. S. 239, a deed was made for land in Arkansas, sold for the non-payment of taxes, which showed the sale was made on a day not authorized by law, and the court held that the deed was void, and was not admissible in evidence to support an adverse possession under the statute of limitations of that State.

And see Alexander v. Gordon, 101 Fed. Rep. 92, 96, etc.

The same construction should be put on the provisions in the statutes referred to by the court below in the

quotation made from its opinion. They were not intended to affect any substantial right of A. B. Ballard or Josephine W. Ballard with respect to their lands. If those statutes bear the construction the court below has put on them in this case, they are unconstitutional and void.

IV.

The sixth and seventh assignments of error will be presented together. In substance, they are that the notice of the pendency of the suit for the levee taxes, if given according to the requirements of Act No. 71 of the year 1895, conveyed no adequate information of the suit to A. B. Ballard and Josephine W. Ballard, and was not such a notice as was required by the same act, or by the general law, to be given of the suit, to the owners of lands subject to the levee taxes, who were citizens of Arkansas, or residents of or within Crittenden County, or to persons owning and occupying lands similarly located and subject to the same taxation, or to persons having such lands on which there were occupants.

A. B. Ballard was a citizen of Florida and Josephine W. Ballard was a citizen of Georgia, and neither of them was in the State of Arkansas, or had occupants on their lands. Under the statute they were entitled only to a notice to be published weekly in a newspaper published in Crittenden County, or some adjoining county, for four weeks before the day on which the sale of their lands for the levee taxes was to be decreed. Any resident of, or person within, Crittenden County was entitled, under the statute, to personal notice of the suit for the levee taxes for at least twenty days before the decree of sale was rendered, and any owner of land subject to the levee taxes, having an occupant on such land, was entitled to a like personal notice of twenty days before the day of the rendition of the decree.

The assignments of error claim that the notice provided for was not sufficient or adequate as to A. B. Bal-

lard and Josephine W. Ballard, or their lands; and, further, that such notice was not the equivalent of the notice provided for as to residents of Crittenden County, or persons within Crittenden county, or persons having occupants upon their lands, and that by reason of the differences and the discriminations in the provisions of the statute for the two classes of notices, and the notices given under the statute, they were denied the privileges and immunities belonging to them as citizens of the United States, and the privileges and immunities of citizens of Arkansas, and the equal protection of the laws as to their lands within the State of Arkansas, and have been deprived of their property without due process of law.

In Ward v. Maryland, 12 Wallace 430, the court, while not undertaking to define "privileges and immunities," or specify rights intended to be secured and protected by the guaranties contained in the Constitution of the United States, said: "Beyond doubt, those words are words of very comprehensive meaning, but it will be sufficient to say that the clause plainly and unmistakably secures and protects the right of a citizen of one State to pass into any other State of the Union for the purpose of engaging in lawful commerce, trade or business, without molestation; to acquire personal property; to take and hold real estate; to maintain actions in the courts of the State, and to be exempt from any higher taxes or excises than are imposed by the State upon its own citizens."

And see Yick Wo v. Hopkins, 110 U. S. 367.

In the Slaughterhouse cases, after referring to Ward v. Maryland, and to Paul v. Virginia, the court said: "The Constitutional provisions there alluded to did not create those rights which it called privileges and immunities of citizens of the State. It threw around them, in that clause, no security for the citizen of the State in which they were claimed or exercised. Nor did it pro-

fess to control the power of the State governments over the rights of its own citizens. Its sole purpose was to declare to the several States that whatever those rights, as you grant or establish them to your own citizens, or as you limit, or qualify, or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other States within your jurisdiction."

16 Wallace 77.

In Cole v. Cunningham the court said: "The intention of Sec. 2, Art. 4, was to confer on the citizens of the several States a general citizenship, and to communicate all the privileges and immunities which the citizens of the same State would be entitled to under the like circumstances, and this includes the right to institute actions."

133 U. S. 113-114.

In Blake v. McClung the court referred to the former cases, and made a number of quotations from them. The decision there was that it is not in the power of one State, when establishing regulations for the conduct of private business of a particular kind, to give its own citizens essential privileges, connected with that business, which it denies to citizens of other States. After making a number of exceptions, or distinctions, or qualifying general language in a number of particulars, the court said: "The Constitution forbids only such legislation affecting citizens of the respective States as will substantially or practically put a citizen of one State in a condition of alienage when he is within, or when he moves to, another State, or when asserting, in another State, the rights commonly appertaining to those who are part of the political community known as the People of the United States, by and for whom the government of the Union was ordained and established."

172 U. S. 256-257.

See *Ex Parte* Deeds, 3 Ark. Law. Rep. 159, and 75 Ark. 542.

A. B. Ballard and Josephine W. Ballard were entitled to be treated substantially the same as all other owners of lands subject to the levee taxes, in the suit for the collection of those taxes. Now, let us see if that has been done in the suit as carried on under the legislation.

They were non-residents of Crittenden County, but their deeds for the lands were of record in the Recorder's office there. (Record, pp. 38-39.) A resident of Crittenden County, owning lands with recorded deeds, liable to the same taxation, and proceeded against in the same suit, was entitled to notice of the suit by the service of personal summons of the court "at least twenty days before the day on which such resident owner was required to answer as set out in the summons." (Acts of 1895, p. 90.) And, in addition, if an owner of lands liable for the levee taxes, and proceeded against in the same suit, was in Crittenden County, or had an occupant on his lands, then he was entitled to actual service of summons, probably by analogy, for at least twenty days, as in the case of a resident of the county; or, if not, then, under the general law, for the time prescribed by that law, before a decree could be taken against him. (Acts of 1895, p. 92.)

A. B. Ballard and Josephine W. Ballard, being non-residents of Crittenden County, under the statute, were entitled only to notice by publication weekly, for four weeks prior to the day of the term of court on which final judgment might be entered for the sale of their lands, in some newspaper published in Crittenden County, such notice to be entitled in a suit described as

"St. Francis Levee District
vs. Notice.
Delinquent Lands,"

and including all owners of lands in Crittenden County, or persons having interests in them, named in a general list made a part of the notice, embracing hundreds of

tracts of land, by description, according to the assessment books, and hundreds of owners, and stating each owner's name only in connection with his particular tract of land, and telling all persons and corporations addressed as owning or interested in the lands, that a suit was pending in the Circuit Court of Crittenden County, to enforce the collection of certain levee taxes on such list of lands, each owner's name being set opposite his or her tract of land, together with the amount severally due from each tract of land, and that they were notified they were required to appear and make defense to the suit (not naming any time or place), or the same would be taken for confessed, and judgment final would be entered, directing the sale of their lands for the purpose of collecting the delinquent levee taxes, and the interest, penalty and costs allowed by law. (Acts of 1895, pp. 89-90.)

Every resident of Crittenden County, and every person served with process in the county, had at least twenty days after the personal service on him to make defense. A. B. Ballard and Josephine W. Ballard had only four weeks from the date of the first publication of the notice required, in the newspaper, in which to make defense, before the decree of sale could be taken against them, although the fact was that the one resided, and was at the time, in the State of Florida, and the other resided, and was at the time, in the State of Georgia, and neither one ever knew or heard of Act No. 19 of the Acts of 1893, or Act No. 71 of the Acts of 1895, creating the Levee District, and authorizing the levee taxes, or of the fact that the levee taxes had been assessed on their lands, or of the fact that a suit was pending to collect such taxes, or that they were required to appear and make defense to any suit.

It seems hardly necessary to argue that the notice of the suit given A. B. Ballard and Josephine W. Ballard, absent as they were, under the statute, was not the equivalent of the notice given the persons or corporations pres-

ent in Crittenden County, and in a position to act at once, who were personally served with process, as required by that statute. In the one case, the person or corporation actually served with notice would have the entire twenty days in which to make defense. In the other case, if A. B. Ballard and Josephine W. Ballard were not considered as summoned until the four weeks of publication in the newspaper had expired, then they were required to make defense at once, and upon their failure, a decree might have been taken against them on the very day, or the next day after, they had the notice for the sale of their lands. In order that they should be considered as having four weeks' notice before the decree, it must be assumed that they received the notice on the day of its first publication—a very unreasonable assumption.

In Roller v. Holly, 176 U. S. 398, the court held that the notice under consideration was not a reasonable notice, and was not due process of law within the Fourteenth Amendment of the Constitution, and that the judgment obtained in the suit in question there, in Texas, upon such notice, was not binding upon the defendant, who resided in Virginia. The defendant had been served personally in Virginia, to answer in the suit in Texas, within five days after the service. In that case, Justice Brown referred to various statutes of different States, on the subject of constructive notice, and also to the Act of Congress providing for such a notice. The conclusion of the court, after referring to the statutes, was that in cases of publication of notice to absent and non-resident defendants, it is generally required to be given at least once a week for from four to eight weeks, and in case of personal service out of the State, that no notice for less than twenty days between the service and the return day was contemplated in any of the States, except Mississippi, where a personal notice of ten days seemed to be sufficient.

176 U. S. 412-413.

And see:

Clapp v. Houg, 12 North Dakota 600, and 98 N. W. Rep. 710.
Lockman v. Lang, 132 Fed. Rep. 6-7.

Where a publication of notice is required to be for a specified number of days or weeks before the event, or the return day, it has always been held that publication for the entire period prescribed before the time fixed is necessary to constitute the notice, and that a variance shortening the time renders the notice void.

Early v. Doe, 16 Howard 610.
Guaranty Trust Co. v. Green Cove Railroad, 139 U. S. 145.
Hunt v. Wickliffe, 2 Peters 201.
Townsend v. Martin, 55 Ark. 192.
Martin v. McDiarmid, 55 Ark. 213.
Thweatt v. Howard, 68 Ark. 426.
Pennell v. Monroe, 30 Ark. 661.
Martin v. Barbour, 34 Fed. Rep. 701, and 140 U. S. 634.
Gibney v. Crawford, 51 Ark. 34.
Ronkendorff v. Taylor, 4 Peters 364-365.

The general statute provides, with reference to constructive service of process, that "warning orders shall be published weekly for at least four weeks."

Sandels & Hill's Digest, Sec. 5680.
Kirby's Digest, Sec. 6056.

Another general statute provides: "A defendant against whom a warning order has been made and published, shall be deemed to have been *constructively summoned* on the thirtieth day after the making of the order, and the action may proceed accordingly.

Sandels & Hill's Digest, Sec. 5682.
Kirby's Digest, Sec. 6058.

With reference to defenses in cases of constructive service, the general statute provides that the defense

must be filed on the third day of the term "where the defendant has been *constructively summoned* thirty days."

Sandels & Hill's Digest, Sec. 5737.
Kirby's Digest, Sec. 6113.

Another general statute provides: "A defendant constructievly summoned shall be allowed, at any time before judgment, to appear and defend the action, and, upon a substantial defense being disclosed, time may be given, on reasonable terms, to prepare for trial."

Sandels & Hill's Digest, Sec. 5875.
Kirby's Digest, Sec. 6252.

In the legislation, State and National, making provision for notices to persons out of the jurisdiction, or providing for the exercise by such persons of the rights belonging to them in common with the citizens and residents within the jurisdiction, discrimination as to time and opportunity have almost invariably been made in favor of non-residents, as between them and residents, in order to give the former the benefit of the fact of their absence and of the embarrassment or hindrance resulting from the impossibility of communicating notice to them, or their want of knowledge, so that they may not suffer any injury or loss on those accounts. They are always given longer time within which to do the required act than persons to whom actual notice is given, or who possess the means of present knowledge. Common justice requires that this should be done, as every one must know, as a matter of fact, that absent persons, with only the opportunity furnished by constructive notice of getting information, or acquiring knowledge, are not on an equality with persons on the ground, or having notice, in fact, and cannot, as a general thing, do at once what such persons may do.

In Bellingham Bay & British Columbia R. R. Co. v. New Whatcom, 172 U. S. 318-319, where the constructive

notice was held sufficient, Justice Brewer, delivering the opinion, said: "The purpose of the notice is to secure to the owner an opportunity to protect his property from the lien of the proposed taxes, or some part thereof. In order to be effectual, it should be so full and clear as to disclose to persons of ordinary intelligence, in a general way, what is proposed. If service is made only by publication, that publication must be of such a character as to create a reasonable presumption that the owner, if present, and taking ordinary care of his property, will receive the information of what is proposed, and when, and where he may be heard. And the time and place must be such that, with reasonable effort, he would be enabled to attend and present his objections."

And see Marx v. Hanthorn, 148 U. S. 183-185.
Cunnins v. Reading School District, 198 U. S. 476-477.

Not only must the notice be, in itself, sufficient, and be properly given, but, to constitute due process of law, it must place the defendant in a position to assert his rights, and have the benefit of them, and he must not be disabled from doing so by any obstruction put in his way.

Dean v. Nelson, 10 Wallace 172.
McVeigh vs. The United States, 11 Wallace 259.
Lasere v. Rochereau, 17 Wallace 437.
Windsor v. McVeigh, 93 U. S. 274.
Hovey v. Elliott, 167 U. S. 445.

In view of what has been said, we submit A. B. Ballard and Josephine W. Ballard, in this case, have not been afforded the same opportunity, or an equivalent opportunity, of knowing of the suit for the levee taxes and of making defense to it, which, by the law, was accorded to all other persons having lands liable to levee taxes, and residing in Crittenden County, or being there, or having occupants on their lands.

Now, let us contrast the provisions of the general statutes of Arkansas, having reference to the service of pro-

cess, and notice of suits, with the requirements of Act No. 19 of the Acts of 1893, and Act No. 71 of the Acts of 1895, and test, by the contrast, whether or not reasonable notice was given A. B. Ballard and Josephine W. Ballard, assuming that the notice was given in pursuance of Act No. 71 of the Acts of 1895.

By Act No. 71 of the Acts of 1895, as construed by the court below, in this case, a decree of sale could properly have been taken after the expiration of four weeks from the date of the first publication of the notice, and the decree actually rendered, and in question here, was pronounced on the 14th day of February, 1898, though there had been no continuance or postponement of the suit from the January term, 1898, of the Crittenden Chancery Court to that day, and the January term of that court had expired by law several days before the 14th day of February, 1898.

By the general statute, where a summons in equity proceedings has been personally served on the defendant, he has twenty days, and the three days of the term, within which to file his defense if served in the county, and thirty days and the three days of the term, if served in the State, but out of the county.

Sandels & Hill's Digest, Sec. 5737.
Kirby's Digest, Sec. 6113.

In actions at law, if the defendant is personally served outside the State, he has sixty days and the three days of the term in which to make his defense.

Sandels & Hill's Digest, Sec. 5735.
Kirby's Digest, Sec. 6111.

As already seen, the statute requires, to constitute constructive service of process, a publication of the notice weekly for at least four weeks, and then provides that the defendant to whom the notice is given is not construc-

tively summoned until the thirtieth day after the making of the order, and then allows him until the third day of the term of the court, where he has been constructively summoned thirty days, within which to make his defense.

Sandels & Hill's Digest, Secs. 5680, 5682 and 5737.
Kirby's Digest, Secs. 6056, 6058 and 6113.

By the general statute, before any judgment can be rendered in an ordinary suit, against a defendant constructively summoned, who has not appeared, it is necessary (1) that an attorney should be appointed for him at least thirty days before the judgment is rendered, to inform him of the action; and (2) that a bond should be executed to him by the plaintiff, with sureties, to restore the property taken, or to pay the money the court may award the defendant, if restoration be adjudged.

Sandels & Hill's Digest, Sec. 5877.
Kirby's Digest, Sec. 6254.

And a defendant constructively summoned, who does not appear, has the right to appear in the suit at any time within two years after the rendition of the judgment, and have the action re-tried, upon certain conditions, the same as if no judgment had been rendered, and upon the trial the court may pronounce the judgment which ought to have been pronounced in the first instance, or any other proper judgment, and may restore to the defendant what the plaintiff has recovered, or its value. And the plaintiff cannot make the judgment effectual within the two years, except by serving the defendant personally with a copy of it, and then the defendant has a year after the service in which to apply for a new trial in the suit.

Sandels & Hill's Digest, Secs. 5883 and 5884.
Kirby's Digest, Secs. 6259 and 6260.

The attorney provided to be appointed for the defendant constructively served, as above stated, is re-

quired to make a written statement of what he has done in the suit, under his appointment, and file it with the papers in the suit.

Sandels & Hill's Digest, Sec. 5878.
Kirby's Digest, Sec. 6255.

And if the bond required by the statute, in order to obtain the judgment against the defendant constructively summoned, as stated above, is not given, the court is required, in its judgment or decree, ascertaining the rights of the parties, to retain control over the property, or its proceeds, until the expiration of the two years allowed the defendant to make his appearance.

Sandels & Hill's Digest, Sec. 5879.
Kirby's Digest, Sec. 6256.

And, in addition to all this, before rendering a judgment against a defendant constructively summoned, and who has not appeared, the court, in ordinary suits, may cause the plaintiff to appear personally in court, or before a commissioner, and answer interrogatories, under oath, concerning the matters in the complaint, or any matters of defense, including matters of set-off or counter-claim.

Sandels & Hill's Digest, Sec. 5880.
Kirby's Digest, Sec. 6257.

The Act No. 19 of the year 1893, and No. 71 of the year 1895, dispensed with all these provisions of the general statutes in the suit for the levee taxes. After the notice prescribed in Act No. 71 of the year 1895, they require a decree to be immediately pronounced for the levee taxes, and a sale of the land to pay them, and the sale is to be made for cash, and without any appraisement of the property, and without the right or equity of redemption, although, usually, in the State, there is an appraisement and an equity of redemption. In the case of the fore-

closure of mortgages, the courts of the State, either before or after the decree of foreclosure, secure to the mortgagor the right to redeem.

Sandels & Hill's Digest, Secs. 5110-5114.
Kirby's Digest, Secs. 5415-5420.
Bank v. Directors of St. Francis Levee District, 66 Ark. 490.
Martin v. Ward, 60 Ark. 513.
Gavin v. Ashworth, 4 Ark. Law Rep. 118, and 91 S. W. Rep. 303.

It has been held that a sale of the property of one constructively served with notice, who does not appear in the suit, without giving the bond required by the statute (Sandels & Hill's Digest, Sec. 5877; Kirby's Digest, Sec. 6254), is absolutely void.

Bush v. Visant, 40 Ark. 125.
And see Richie v. Sayers, 100 Fed. Rep. 520.

Act No. 19 of the Acts of 1893, and Act No. 71 of the Acts of 1895 were local and special legislation, passed under the permission of Section 25, Article 5, of the Constitution of Arkansas, as was decided in Carson v. St. Francis Levee District, 59 Ark. 529-530.

As to A. B. Ballard and Josephine W. Ballard, who resided in the States of Florida and Georgia, respectively, and were citizens of those States, the two acts were merely foreign laws, and therefore, as to them only facts, and facts they did not and could not know.

A. B. Ballard and Josephine W. Ballard had owned the lands in controversy for a long time, and it may well be presumed that they knew the general laws of the State of Arkansas having reference to the taxation of lands, and the collection of general taxes, including those providing for sales for the non-payment of taxes, and the redemption from sales.

Statutes had been in force in that State almost from its admission to the Union, giving the right to redeem from sales for taxes, at any time within two years after the date of the sale.

Sandels & Hill's Digest, Secs. 6615-6620.
Kirby's Digest, Secs. 7095-7102.

Knowing those laws, A. B. Ballard and Josephine W. Ballard may have supposed that complying with what was required by them, discharged their duty to the State of Arkansas with respect to their lands and the payment of taxes on them.

Being foreign laws, A. B. Ballard and Josephine W. Ballard were not required to take notice of the Acts No. 19 of the year 1893, and No. 71 of the year 1895.

Story's Conflict of Laws, Secs. 637-638a.
Wharton's Conflict of Laws, Secs. 772-773.
1 Wharton's Evidence, Secs. 292 and 300.
2 Pomeroy's Eq. J., Sec. 854.
Miller v. Johnson, 71 Ark. 174.

It is agreed in this record that each—A. B. Ballard and Josephine W. Ballard—would testify that they had no knowledge of the suit, or its pendency, or that the levee taxes had been assessed prior to the date of the sale, or that the statutes as to the levee taxes had been enacted. (Record, pp. 39-40.)

A foreign law, or a local or special law, being merely a fact, courts of equity relieve against a mistake as to it, or for ignorance concerning it, the same as any other fact.

Cook & Steadman v. Sumner S. & M. Co., 1 Sneed (Tenn.) 698, 715, etc.
King v. Doolittle, 1 Head (Tenn.) 77, 84, etc.

The effect of what was done in the suit for the levee taxes—that is, the proceedings, the decree, the sales, and

the conveyances by the commissioner to Hunter and Hackler, respectively—were efforts or attempts to make contracts or conveyances by or for A. B. Ballard and Josephine W. Ballard of their lands, and must have the effect of valid conveyances of contracts on their part, or as made by them, if they have any effect at all.

A. B. Ballard and Josephine W. Ballard are, therefore, entitled to the same relief because of their ignorance, of mistakes as to, the material facts resulting in the sales, that they would be entitled to had they jointly, instead of the commissioner of the Chancery Court, made the deeds of conveyance to Hunter and Hackler. If they had made such deeds under the state of facts existing, mistaking those facts and their duties or obligations and rights thereunder, it would have been a matter of course for a court of equity to relieve them from the sales, and they are now entitled to the same relief, under the state of facts presented, as if they personally had made the deeds.

2 Pomeroy's Eq. J., Secs. 849 and 838-839.
3 Pomeroy's Eq. J., Secs. 1317-1318.
1 Pomeroy's Eq. J., Secs. 134-135, 170 and 428.
Foster's Fed. Pr. (1st. Edn.), Secs. 319-320.
1 Story's Eq. J., Sec. 140.

The effect and operation of such statutes are well illustrated by the case of Williamson v. Berry, 8 Howard 495. The State of New York passed certain acts for the relief of Thomas B. Clark, in relation to a devise of land, and directed that the acts should be carried into execution by the chancellor of the State. In the course of the proceedings for that purpose, the chancellor directed that the trustee, Clark, might sell or mortgage particular portions of the land, and permitted him to convey parts of it in payment of any debt or debts, upon a valuation to be agreed on between himself and his creditors, and that Clark might apply the proceeds of the sales to the payment of his debts. Clark made a conveyance of a portion of the land to a creditor in payment of a debt he owed

him, and his conveyance was approved by the chancellor in due form.

The question presented for decision was whether or not Clark's deed conveyed a good title, as against the prior owners of the land. The highest tribunal in New York had decided that the chancellor had jurisdiction, under the act, to give the order permitting the sale, and had sustained the title of the purchaser under the sale. The court said the question for decision was whether the chancellor had jurisdiction to give the order permitting Clark to convey a part of the property in payment of a debt, and that, after a careful perusal of the acts and orders, it had concluded that the chancellor had not the jurisdiction to give the order, and that neither the purchaser, or his alienee, could derive from the conveyance any title to the premises.

Decisions were cited, made in the State of New York, and relied upon as sustaining and establishing the construction contended for of the acts of its Legislature, and it was argued that this court was bound by those decisions. The court doubted that the decisions had been made in New York as insisted, and in reply said: "But admitting that the New York cases are otherwise (that is, they had so decided the question), we cannot admit that the rule hitherto observed in the court, of recognizing the judicial decisions of the highest courts of the State, upon State statutes, relative to real property, as a part of local law, comprehends private statutes, or statutes giving special jurisdiction, to a State court for the alienation of private estates. It has never been extended by private acts relative to particular persons, for the reason that whatever a court in a State may do, in such a case, its decision is no part of local law. It concerns only those for whose benefit such a law was passed, and because the decision under it is no rule for any other future case. It may from analogy be cited for the interpretation of another private law, of a like kind, but then

the utmost extension of it would be that there would be two judgments, in two private cases, which only show more plainly that no local law had been made by both."

8 Howard 543-544.

It is to be observed that Williamson v. Berry was decided long before the adoption of the Fourteenth Amendment to the Constitution of the United States, and the provisions of that amendment now have a material bearing upon the questions presented for decision in that case.

After stating the case, the court said there:

"This evidence raises the question whether or not the chancellor had the jurisdiction to give an order permitting Clark to convey any part of the property in payment of a debt. After the most careful perusal of the acts and orders, we have concluded that the chancellor had not the jurisdiction to give an order permitting Clark to convey any part of the devised premises in satisfaction of his debts; and that neither DeGrass, nor his alienee, Berry, can derive from the order, or the conveyance by Clark to DeGrass, any title to the premises in dispute."

8 Howard 544.

Justice Miller, in Huling v. The Kaw Valley Railway Company, 130 U. S. 559, in what he said, did not indicate anything to the contrary of our positions. His language was: "The owner of real estate, who is a nonresident of the State within which the property lies, can not evade the duties and obligations which the law imposes upon him in regard to such property by his absence from the State. Because he cannot be reached by some process of the courts of the State, which, of course, has no efficacy beyond their own borders, he cannot, therefore, hold his property exempt from the liabilities, duties and obligations which the State has a right to impose upon such property. And, in such cases, some substi-

tuted form of notice has always been held to be sufficient warning to the owner, of the proceedings which are being taken under the authority of the State to subject his property to those demands and obligations. * * * It is, therefore, the duty of the owner of real estate, who is a non-resident, to take measures that in some way he will be represented when his property is called into requisition, and if he fails to do this, and fails to get notice by the ordinary publications which have usually been required in such cases, it is his misfortune, and he must abide the consequences."

130 U. S. 563-564.

Justice Miller spoke only of the general laws of the State and the administration of such laws in the usual way, and of cases in which the notice given to the owner of the land, under the general laws, was "a notice by the ordinary publications which have usually been required in such cases," and such notice, as the authorities show, as is required to constitute "due process of law." He was not speaking of such legislation as Act No. 19 of the Acts of 1893, and Act No. 71 of the Acts of 1895, in question here, operating locally, in only a small portion of the State, and a few counties of the State, and creating a special system of assessment or taxation, different from the general system, or any other before instituted, and providing for a special and summary mode of enforcement or collection, substantially without any notice to the owners of the lands, or the parties to be affected, and without any right of redemption, or any method of protection, except by payment of the sums demanded, strictly according to the demand.

The suit provided for in the Acts of the General Assembly, No. 19 of the year 1893, and No. 71 of the year 1895, as those acts declare, is "a chancery proceeding," and in a "court having chancery jurisdiction" (Acts of 1895, p. 88), and is to be "conducted in accordance with the

practice and proceedings of Chancery Courts," except as expressly excepted in the act (Acts of 1895, p. 92), and the court is required to construe the law "liberally, to give said assessment lists the effect of *bona fide* mortgages for a valuable consideration, and a first lien upon the said lands as against all persons having an interest therein." (Acts of 1895, p. 92.)

It was agreed in the Chancery Court of Crittenden County, between the parties, that the matters presented by the pleading of A. B. Ballard and Josephine W. Ballard should be heard as an agreed case, upon the agreed statement of facts, before filed in the cause, and the evidence therein referred to, without any plea thereto (record, p. 37), and, further, that the agreement as to facts should be filed as part of the record, and treated as such in that court, and the Court of Appeals, and either party was to have the benefit thereof for the purposes of the suit and the appeal. (Record, pp. 40-41.)

The pleading presented by A. B. Ballard and Josephine W. Ballard, when they came into the case, asked the court that it be taken and considered as an original complaint under Section 5882, Sandels & Hill's Digest (Kirby's Digest, 6259), and as a petition under Sections 5839-5843, Sandels & Hill's Digest (6215-6220, Kirby's Digest), and as an original complaint under Sections 4197-4199, Sandels & Hill's Digest (4431-4433, Kirby's Digest), and Sections 6121-6124, Sandels & Hill's Digest (Sections 6520-6521, Kirby's Digest), and also that it be taken and filed as a bill of review of the decrees and proceedings in the suit. (Record, pp. 27-37.)

The court made an order upon the pleading (record, p. 26), that leave was given to file it, and that A. B. Ballard and Josephine W. Ballard were made parties to the suit for the purposes set out in the pleading.

The first of the statutes referred to (Kirby's Digest, Sec. 6259), provides: "Where a judgment has been ren-

dered against a defendant, or defendants, constructively summoned, and who did not appear, such defendants, or any one or more of them, may, at any time within two years, and not thereafter, after the rendition of the judgment, appear in open court, and move to have the action re-tried; and security for the costs being given, such defendant, or defendants, shall be permitted to make defense, and thereupon the action shall be tried anew as to such defendant, or defendants, as if there had been no judgment. And upon the new trial the court may confirm, modify or set aside the former judgment, and may order the plaintiff in the action to restore to any such defendant, or defendants, any money of such defendants paid to them under such judgment, or any property of such defendants obtained by the plaintiff under it, and yet remaining in his possession, and pay to the defendants the value of any property which may have been taken under an attachment in the action, or under the judgment, and not restored; provided the provisions of this section shall not apply to judgments granting a divorce except so far as relates to alimony."

The decree of sale was rendered on the 14th day of February, 1898 (record, p. 14), and the pleading of A. B. Ballard and Josephine W. Ballard was filed on the 25th day of September, 1899 (record, p. 37), and was ordered to be filed at the September term, 1899, of the Chancery Court (record, p. 26), and was treated by the court below as properly presenting the matters in controvery for adjudication. (Record, pp. 72 and 80.) And see Waldo v. Thweatt, 64 Ark. 131, for the construction put by the court upon the statute quoted. Also Porter v. Hanson, 36 Ark. 599.

In their pleading A. B. Ballard and Josephine W. Ballard fully set out (Record pp. 28-35) their objections to the decree of sale and the proceedings thereunder, as well as their defenses against Hunter and Hackler, purchasers at the sale, and among them, that on the 10th day of

March, 1899, they tendered to Hunter and Hackler the sums they had bid for the tracts of land they purchased, and such additional sums as they were entitled to, and asked them to allow the redemption of the said lands from the said sales, but they refused to permit the redemption, and insisted upon their titles. They also alleged that they brought the money into court and offered to pay it as the court might order. (Record p. 32.) The tender and refusal are agreed to as facts in the agreed statement of facts. (Record pp. 40-41.)

In the prayer of the pleading (Record p. 36) it was asked that all the parties to the suit, including the plaintiff, the Board of Directors of the St. Francis Levee District, and Hunter and Hackler, the purchasers, be treated as parties and brought before the court as defendants, if necessary, by process, and that the decree of sale and all subsequent decrees affecting the lands of A. B. Ballard and Josephine W. Ballard, be reviewed, reversed, vacated, set aside and held for naught. It was also asked that the sales made to Hunter and Hackler be vacated, and that the deeds made them be canceled, and that the title of A. B. Ballard and Josephine W. Ballard be cleared and quieted and confirmed, and made perfect against the proceedings in the suit for the levee taxes, and then that A. B. Ballard and Josephine W. Ballard be permitted to pay the levee taxes due on their lands, including all penalties, interest and costs, and they again offered to bring into court and deposit the money necessary, to be disposed of by the court. They then prayed further that, if more appropriate, they be allowed to redeem the lands from Hunter and Hackler by paying them the sums they were entitled to in order to effect the redemption, and they again offered to bring the money into court and deposit it subject to the order of the court. Finally, if proper, they asked leave to increase the bids of Hunter and Hackler, respectively, for the tracts of land, and offered to increase such bids by the amount of 50 per cent. upon each bid, and again offered to bring the money

into court to make good the bids. (Record pp 36-37.) There was also a prayer for general relief.

The parties agreed that, without any plea, the matters presented in the pleading of A. B. Ballard and Josephine W. Ballard should be heard as an agreed case upon the agreed statement of facts before then filed (Record pp. 38-41), and the evidence referred to in that agreed statement (Record p. 37.).

Pennoyer v. Neff, 95 U. S. 715, was heard on an agreed statement.

While in consequence of the condition of the record A. B. Ballard and Josephine W. Ballard have been obliged to assume the nominal positions of plaintiffs in the suit, it is clear that they, in substance, are defendants, and that the suit is the same suit the Board of Directors of the St. Francis Levee District brought, as appears by the complaint (Record p. 9), for the collection of the levee taxes, and that the burden is upon it, or Hunter and Hackler, the purchasers, to establish its right to the decrees, and the correctness and regularity of the sales under the decrees at which Hunter and Hackler have bought, as muniments of their title, and in order to destroy or defeat the title of A. B. Ballard and Josephine W. Ballard.

This is so because of the statute already copied. A. B. Ballard and Josephine W. Ballard were only constructively summoned in the suit and did not appear. They have come in now, as permitted by the statute, and the court has recognized them as before it in the suit, under the statute. The statute provides that such defendants "shall be permitted to make defense, and thereupon the action shall be tried anew as to such defendant or defendants, as if there had been no judgment."

Sandel's and Hill's Digest, Sec. 5882.
Kirby's Digest, Sec. 6259.

By becoming purchasers at the sale and complying with their purchases Hunter and Hackler, respectively, made themselves parties to the suit with respect to the land purchased by them, respectively, for all the purposes of the suit and subject to all the decrees and proceedings had, and to be had, therein.

Bright v. Pennywit, 21 Ark. 130.
Porter v. Hanson, 36 Ark. 591.
Pickett v. Ferguson, 45 Ark. 177.
Burgess v. Poole, 45 Ark. 373.
Camden v. Mayhew, 139 U. S. 73.
Kleber's Void Judicial and Execution Sales, Sec. 467.

It is quite clear from the record that the courts below —both the Crittenden Chancery Court and the Supreme Court of Arkansas—have treated the case as one presenting all the questions involving the title to the lands in controversy, as between A. B. Ballard and Josephine W. Ballard on the one side, and Hunter and Hackler, respectively, on the other, which could be raised, or could be presented in any suit or proceeding that either party could institute for the purpose of trying those questions.

Randolph v. Nichol, 74 Ark. 93, 101.

And all the questions that could be presented in any such suit are now before this court upon this writ of error. The lands having been sold and the deeds made in the suit now here, intervention in the suit to attack the sales and deeds and maintain their own titles to the lands was the appropriate remedy of A. B. Ballard and Josephine W. Ballard.

Kirby's Digest, Secs. 6012 and 6259.
Davoue v. Fanning, 4 Johnson's Ch. R. 199, 202-204.

Under the Constitution of the United States (Art. 4. Sec. 2), A. B. Ballard and Josephine W. Ballard as citizens of Florida and Georgia, respectively, are entitled

to all the privileges and immunities of citizens of Arkansas, and, by the Fourteenth Amendment, the State of Arkansas could, not make and cannot enforce against them any law having the effect to abridge their privileges or immunities as citizens of the United States, or of depriving them of their lands without due process of law, or denying them as to their lands the equal protection of the laws. They deny that they have been conceded in this case the privileges and immunities of citizens of Arkansas, and claim that their privileges and immunities as citizens of the United States have been abridged by the legislation of Arkansas and the decision of the court below in this case, and that the effect of that legislation and of that decision is to deprive them of their lands, without due process of law, and also to deny them, with respect to their lands, the equal protection of the laws of the State of Arkansas existing when the facts on which their rights depend, as presented in this suit, occurred or came into existence. They claim the benefit of the laws of the State of Arkansas, as then established, and deny that the decision in this case, or any departure from such established laws, or any change in the laws, or in the course of decision since their rights accrued, can affect such rights, and they ask the court in this case to pass upon and determine all those questions.

Louisville Trust Co. v. City of Cincinnati, 76 Fed. Rep. 296.
Jones v. Great Southern Fireproof Hotel Co., 86 Fed. Rep. 370.
Great Southern Fireproof Hotel Co. v. Jones, 116 Fed. Rep. 794.
Great Southern Fireproof Hotel Co. v. Jones, 193 U. S. 532.
Thomas v. Board of Trustees, 195 U. S. 207.
Wells Company v. Gastonia Company, 198 U. S. 177.
Butz v. Muscatine, 8 Wallace 575.
Olcott v. The Supervisors, 16 Wallace 690, etc.

In Parker v. Overman, 18 Howard 137, and later in Martin v. Barbour, 140 U. S. 634, each a case brought in

a court of Arkansas to confirm a tax title under the statute of that State and then removed to the Circuit Court of the United States on the ground of diverse citizenship, the court sustained its jurisdiction to pass on the merits of the controversy and determined, after passing on all the questions raised as to the regularity and validity of the sales for the taxes, and the titles of the purchasers at the sales, that the sale and purchase in each case was invalid, and that the deeds the purchasers held were mere clouds on the title of the former owners, and decreed that they be canceled and annulled. 18 Howard, p. 143, and 140 U. S. 647, and 34 Fed. Rep. 713. And see Wehrman v. Conklin, 155 U. S. 314. And in this connection the statute already referred to under which A. B. Ballard and Josephine W. Ballard have come into this case (Sandel's & Hill's Digest, Sec. 5882; Kirby's Digest, Sec. 6259) is to be considered.

The land bought by Hackler was valued at $320.00 and the price she paid was $18.50. Two of the tracts bought by Hunter, aggregating 480 acres, were valued together at $690.00, and he paid for those tracts $78.25, and for the other tract valued at $160.00, $14.50.

The valuations had been arrived at by estimating the increase in value on each acre of land by reason of the levee to be constructed and that increase on each acre was put at $2.00, and then the levee taxes were all fixed on each acre at 2 per cent. of such increased value. The intrinsic value of the lands, independently of the increased value to result from the construction of the levee, was not estimated or considered.

It is manifest, therefore, that the prices paid by Hunter and Hackler for the lands they bought were but an insignificant part of their value.

It is true that ordinarily mere inadequacy of price will not invalidate a judicial sale or execution, but it is always a circumstance to be considered by a court of equity

in passing on the question whether such judicial or execution sale shall stand or be set aside when that question is presented.

In Martin v. Barbour, 34 Fed. Rep. 711, the court said: "The rule *caveat emptor* applies to the purchaser of a tax title. He is not a *bona fide* purchaser for value without notice. For such titles the commissioner is directed to execute to the purchaser a quit claim deed. (Sec. 4245 Mansfield's Digest.) The purchaser takes the land in the same plight the State held it, and subject to the same equities and defenses. Cooley on Taxation (2d Edition), 475-553; 2 Desty on Taxation 850." 34 Fed. Rep. 711.

That case was affirmed on appeal by this court, 140 U. S. 634-646, etc.

And see:

Worthen v. Fletcher, 71 Ark. 386.
Black on Tax Titles (1st Edn.), Sec. 263.

A long line of cases in Arkansas has settled that any unfair conduct in procuring a judgment or decree, or on the part of those controlling or making a judicial or execution sale, and any combination of facts which make it reasonably certain that the judgment or decree was unlawfully obtained, or the sale was made under circumstances having a tendency to prevent the realizing of a fair price from the bidders, when added to the inadequacy will be taken hold of by the courts to grant a new trial or to enjoin the judgment or decree, or to vacate the sale or open the biddings, or permit a redemption, or to do whatever may be required to accomplish the ends of justice. Kizer Lumber Co. v. Mosley, 56 Ark. 544 is a case on the question. And see Brittain v. Handy, 20 Ark. 381; Penn v. Tolleson, 20 Ark. 62; Thomason v. Craighead, 32 Ark. 391; State National Bank v. Neel, 53 Ark. 110.

See also Lee v. Armour, 35 Arks. 123.
Peel v. January, 35 Arks. 331.
Guess v. Amis, 54 Arks. 1.
Chambliss v. Reppy, 54 Arks. 539.
McLeod v. Tisdale, 57 Arks. 354-355.
Waldo v. Thweatt, 64 Arks. 130-132.

A. B. Ballard and Josephine W. Ballard had the right to reside in Florida and Georgia, respectively, and own the lands in controversy in Arkansas, and to allow the lands to be unimproved and vacant. They were under no obligation or duties to the State of Arkansas with reference to the lands except such as its general laws imposed. In the Act of Congress and the acceptance by the General Assembly constituting the admission of Arkansas to the Union, it was provided that "in no case shall non-resident proprietors be taxed higher than residents," thus putting the lands not owned by citizens or residents on an equality with those owned in the State.

Sandel's & Hill's Digest, pp. 197-199.
Green v. Biddle, 8 Wheaton, pp. 11-18 and pp. 69-85.

A. B. Ballard and Josephine W. Ballard were absent from the State of Arkansas and had no notice of the levy of the levee taxes on their lands, nor of the suit to recover them, and no notice that the legislation, namely, the two acts of the General Assembly, No. 19 of the year 1893, and No. 71 of the year 1895, had been enacted. If any notice was given them under the statute (Acts of 1895, No. 71) in the suit for the levee taxes, it was such a notice as in all probability never could reach them and which, as a matter of fact, never did reach them. The complaint in the suit was filed on the 21st day of December, 1897 (Record p. 14). The term of the Chancery Court of Crittenden County begun on the third Monday of January, 1898. That term of court was required to end before the first Monday of February, 1898, because the same chancellor was required to hold the regular term

of the Cross County Chancery Court on that day. The decree of sale was pronounced on the 14th day of February, 1898. (Record p. 14.) How the court came to be in session on that day the record does not disclose. At the sales made them in the suit Hunter and Hackler purchased the property for less than a fiftieth part of its real value.

Under these facts and without going into any others we submit the sales to Hunter and Hackler should not be allowed to stand. Even if the requirements of the legislation contained in Act No. 19 of the Acts of 1893 and Act No. 71 of the Acts of 1895 have been literally complied with they should not be allowed to stand.

In Graffam v. Burgess, 117 U. S. 180, the court held that great inadequacy of price at judicial sales of real estate requires only slight circumstances of unfairness in the conduct of the party benefited by the sale to raise a presumption of fraud. In the opinion in that case Justice Bradley said: "It is insisted that the proceedings were all conducted according to the forms of the law. Very likely. Some of the most atrocious frauds are committed in that way. Indeed, the greater the fraud intended the more particular the parties to it often are to proceed according to the strictest forms of law." 117 U. S. 186.

In the later case of Shroeder v. Young, 161 U. S. 334, the court had the question before it and referred to a number of cases, and held that while mere inadequacy of price has rarely been held sufficient in itself to justify setting aside a judicial sale of property, the courts are not slow to seize upon other circumstances impeaching the fairness of the transaction as a cause for vacating it, especially if the inadequacy be so gross as to shock the conscience. If the sale has been attended by any irregularity, as if several lots have been sold in bulk where they should have been sold separately, or sold in such a man-

ner that their full value could not be realized, if bidders have been kept away, if any undue advantage has been taken to the prejudice of the owner of the property, or he has been lulled into a false security, or if the sale has been collusively or in any other manner conducted for the benefit of the purchaser, and the property has been sold at a greatly inadequate price, the sale will be set aside and the owner permitted to redeem.

161 U. S. 337-338.

And see in addition:

Byers v. Surget, 19 Howard 303.
Howell v. Baker, 4 Johnson's Chancery 118.
Wheeler v. Smith, 9 Howard 55, 81-83.
Slater v. Maxwell, 6 Wallace 269, 274-277.
Snell v. Insurance Co., 98 U. S. 85, 88-93.
Griswold v. Hazard, 141 U. S. 260, 283-288.
Adams v. Cowen, 177 U. S. 471, 479-485.

Slater v. Maxwell involved a sale for taxes. In that case Justice Field said: "It is essential to the validity of tax sales not merely that they should be conducted in conformity with the requirements of the law, but that they should be conducted with entire fairness. Perfect freedom from all influences likely to prevent competition in the sale should be, in all such cases, strictly exacted. The owner is seldom present and is generally ignorant of the proceeding until too late to prevent it. The tax usually bears a very slight proportion to the value of the property, and thus a great temptation is presented to parties to exclude competition at the sale and to prevent the owner from redeeming when the sale is made. The proceeding, therefore, should be closely scrutinized, and whenever it has been characterized by fraud or unfairness, should be set aside, or the purchaser be required to hold the title in trust for the owner." 6 Wallace 276.

Martin v. Barbour, 34 Fed. Rep. 701, and 140 U. S. 634, also involved a sale for taxes. That was a proceeding

brought by the purchaser at a tax sale to confirm his purchase under the statute of Arkansas providing for confirmations of such titles. The relief the former owner obtained was in defense of that suit, on the ground that the tax sale was void for numerous reasons.

In that case the lands had been struck off at a sale for the taxes for the year 1884 to the State, and the statute made it the duty of the clerk to record in a book each town lot or tract of land sold to the State, with the taxes, penalty and costs due thereon, and immediately after the sale to transfer upon the tax books each lot or tract of land sold for taxes to the name of the purchaser, thereafter to be assessed in the name of the purchaser, except where the State was the purchaser, in which case the lot or tract of land was no longer to be assessed for taxation, but was to be taken off the tax books and entered in a book of State lands, which the clerk was required to keep. If a tract of land was not redeemed from the State within two years from the date of the sale the Commissioner of State Lands was authorized to sell it at private sale for the sum for which the State had bought it.

The lot in controversy in that case was sold, after two years, to Martin, who asked the confirmation of his title. (34 Fed. Rep. 708-709.) The clerk did not transfer the lot or tract of land in controversy after the sale for 1884 to the State, or take it off the tax books, but it was assessed for taxation for 1885, the next year, against the original owner, and for several years thereafter like assessments were made, and the taxes for all those years were paid by the original owner, leaving out, however, the taxes for 1884, the year for which the State had purchased the lot, which remained unpaid. When the agent applied after the sale to the collector to pay the unpaid taxes on the lot or tract he was told there was nothing due except for the year 1885, which was the next year after the sale to the State, and those taxes he paid. The property was a boarding house or hotel, worth $7,000 or

$8,000. The owner resided in a distant State and had a local agent. The agent had the money with which to pay the taxes, but he appropriated the money and left the State without paying them. The price for which the State bought the land for taxes was $110.95. After the time for redemption had expired Martin, the purchaser from the State, set up his title and asked for its confirmation.

The court held that the owner had been prevented from discovering the sale and making the redemption by the official misconduct or mistake of the clerk who made out the assessment book, and that she should be permitted to redeem on discovering the facts. The decree entered was that the deed to Martin, the purchaser from the State, was void, but he had a lien on the lot for the purchase money and interest, and that the lot should be sold for its payment unless that amount was paid in a prescribed time.

On the immediate point now being presented the Circuit judge said: "The county clerk makes and keeps the record of the sale of delinquent lands for taxes. He makes and keeps the record showing the lands bid in by the State for taxes, and he makes up the assessment book of real estate, and is enjoined by law not to put such lands on it, and certainly, if he does, their previous forfeiture ought to be noted. When he put the land in controversy on the tax books for 1885 and again for 1886, without noting the previous forfeitures, it amounted to a solemn declaration of record, repeated each of those years, that it had not been forfeited for taxes, and that no deliquent taxes were due upon it. The owner and her agent had a right to presume that the clerk had done his duty. On these facts the owner is entitled to redeem on paying the amount bid by the State, with interest from that date." 34 Fed. Rep. 711.

On that point this court said, among other things: "To permit the sale to the appellant to be confirmed would

be to assist the State to take advantage of its own wrong. The right to redeem is a substantial right, and was prevented from being exercised within the statutory period of two years by the dereliction of duty on the part of the officers of the State. The sale was made contrary to law, and it was the duty of the Circuit Court, under the statute, to annul it in order to allow the redemption to take place. No more manifest case for the interposition of a court of equity can be imagined. The State is bound by the acts of her officers in placing the lot on the tax books for the years 1885 and 1886, and receiving from the appellees the taxes for those years. Equity will treat the transaction as a waiver of the prior supposed forfeiture, and will regard the tax paid for 1885 and 1886 as so much paid toward redemption, and will permit the payment of the rest. The appellant took his deed for the land in the same condition in which the State held it and subject to the same equities and defenses. The State, having created its bureau of taxes, is bound to see to it that its officers impart correct information to parties dealing with it and do not mislead them." 140 U. S. 646-647.

And see:

Dubois v. Hepburn, 10 Peters 22-23.
Cocks v. Izard, 7 Wallace 559.
Corbett v. Nutt, 10 Wallace 464.
Jackson v. Ludeling, 21 Wallace 632, etc.
U. S. v. Lee, 106 U. S. 199, etc.
Gage v. Pumpelly, 115 U. S. 454.
Krippendorf v. Hyde, 110 U. S. 276.
Johnson v. Waters, 111 U. S. 667, etc.
Gumbel v. Pitkin, 124 U. S. 131.
Arrowsmith v. Gleason, 129 U. S. 97, etc.
Marshall v. Holmes, 141 U. S. 596, etc.
Rolling Mill Co. v. Ore & Steel Co., 152 U. S. 596, etc.
Ritchie v. Sayers, 100 Fed. Rep. 532, etc.
Fahrney v. Kelly, 102 Fed. Rep. 407, etc.

V.

The eighth assignment of errors is that the sales of the lands of A. B. Ballard and Josephine W. Ballard were void and passed no title because in the suit in which the sales were made the laws of the State of Arkansas applicable, were disregarded and violated as follows:

(a) There were no sufficient allegations of a cause of action in the complaint in the suit as against A. B. Ballard and Josephine W. Ballard, or their lands.

(b) There was no sufficient affidavit made and filed to support a warning order, or order for notice to A. B. Ballard and Josephine W. Ballard.

(c) There was no sufficient proof of the publication of any warning order or any notice to A. B. Ballard and Josephine W. Ballard filed or produced in court when the decree of sale of their lands was rendered; and

(d) The decree of sale does not state, and the decree does not show, the facts essential to the validity of the decree of sale as against A. B. Ballard and Josephine W. Ballard, or their lands.

The decree, therefore, has denied to A. B. Ballard and Josephine W. Ballard the benefit of the laws of the State of Arkansas, in the suit, in violation of the Constitution of the United States, and thereby they have been deprived of their property without due process of law.

We will take up these grounds in the order named:

(A)

The sufficiency of the complaint.

The complaint is in the record, pp. 9-14.

It is not signed by the plaintiff, or its attorney, nor verified by the plaintiff as required by the statute (Kirby's Digest, Sec. 6120), the place for the signature of the solicitor being blank.

Neither Act No. 19 of the Acts of 1893, nor Act No. 71 of the Acts of 1895, prescribes what shall be contained in the complaint in the suit to collect the levee taxes, but the latter act does provide for granting the relief "as prayed in the complaint."

Acts of 1895, p. 91.

The suit is to be in a court having chancery jurisdiction, and by chancery proceedings, "conducted in accordance with the practice and proceedings of Chancery Courts."

All or any part of the delinquent lands in any county may be included in one suit for the collection of the delinquent taxes, and all delinquent owners of such lands, including those unknown, may be included in the suit as defendants; and a general notice of the pendency of the suit may be given as against non-residents of the county and unknown owners, in a form prescribed. The suit was to be styled:

"ST. FRANCIS LEVEE DISTRICT

vs. Notice.

DELINQUENT LANDS."

The description or list of the lands was to be included in the notice, and opposite each tract of land was to be the name of each supposed owner, and the amounts severally due from each. The persons and corporations interested were to be notified that they were required by law to appear and make defense to the suit, or it would be taken for confessed and judgment would be entered directing a sale of the lands for the purpose of collecting the delinquent levee taxes and interest, penalty and costs allowed by law.

Acts of 1895, pp. 89-90.

The court was required by the acts to give judgment against the persons claiming to be the owners of the lands for the amounts of the assessments and the penalty and interest from the end of thirty days, and all the costs of the proceedings.

Acts of 1895, p. 88.

The complaint in the suit, therefore, must set out enough to constitute a cause of action in favor of the plaintiff—the Board of Directors of the St. Francis Levee District, or the St. Francis Levee District against A. B. Ballard and Josephine W. Ballard, or their lands, for the levee taxes sued for. The record is complete, and the court can infer nothing not stated in it.

Gregory v. Bartlett, 55 Ark. 36.
Galpin v. Page, 18 Wallace 364.

See the certificate of the clerk authenticating the transcript of the record. (Record, pp. 78-79.)

The list of the lands of A. B. Ballard and Josephine W. Ballard, as contained in the list attached to the complaint is in the record, p. 12, and is as follows:

"TOWNSHIP 4 NORTH, RANGE 7 EAST.

West half southeast quarter, Section 32, township 4 north, range 7 east, 480 acres, assessed to A. B. Ballard:

Taxes for 1895 ..... $19.20
Taxes for 1896..... 19.20
Taxes for 1897..... 19.20

West half northeast quarter, Section 32, township 4 north; range 7 east, 80 acres, assessed to A. B. Ballard:

Taxes for 1895..... $3.20
Taxes for 1896..... 3.20
Taxes for 1897..... 3.20

Northeast quarter, Section 31, township 4 north, range 7 east, 160 acres, assessed to A. B. Ballard:

Taxes for 1895 ..... $6.40
Taxes for 1896 ..... 6.40"

After setting out what was done towards authorizing the levy of the levee taxes (Record, p. 12) the complaint stated "that all the lands in said district were duly assessed for taxation as per the said increased value, or betterment thereof, by the assessors elected under said acts, and in accordance with the terms and requirements thereof, and the benefits or increased value, as aforesaid, of the lands herein described, and referred to as belonging to the said defendants, were assessed at the value of two dollars ($2.00) for each and every acre thereof for said year 1894, and the said lands were likewise assessed for at the same rate for 1894, 1895, 1896 and 1897, said lands being and constituting a part of the area and territory of said Levee District."

Record, pp. 12-13.

This was not sufficient.

Jacks v. Dyer, 31 Ark. 338, 339, etc.

There is nothing else in the complaint on the subject of the assessment of the lands.

The Act No. 19 of the year 1893 provided for the meeting of the land owners in each county of the Levee District, at which elections were to be held, and they were to vote upon the proposition to levy an annual assessment for levee purposes, and that two-thirds of those voting at all the meetings in the Levee District should vote in favor of the proposition before the levee tax could be assessed..

The Supreme Court of Arkansas sustained the constitutionality of the act on the ground that the Board of Directors of the St. Francis Levee District was not a corporation within the provisions of Section 2, Article 12 of the Constitution of Arkansas, but was created only as a governmental agency, or *quasi* corporation, and that the grant of its powers—that is, to levy and collect and apply the levee taxes—was to be assimilated to the grant

of similar powers to counties, townships, school districts, and the like organizations for local purposes, and was to be supported on the same grounds.

Carson v. Levee District, 59 Ark. 533-535.

And see:

Davis v. Gaines, 48 Ark. 371, 385, etc.
Levy Court v. Coroner, 2 Wallace 507.
School District v. Insurance Co., 103 U. S. 708.

In Washington v. The State, 13 Ark. 752, the leading case on the subject, the distinction was taken between taxation for State purposes, and taxation or assessments for local purposes, and the doctrine was announced that such local taxation or assessments may well be authorized, if self imposed, according to the discretion of the people of the locality, through their agents, or officers elected by them, and directly responsible to them.

The distinction was also taken in that case between the power of the State as to taxation, and its power to grant authority to counties and towns to levy taxes for local purposes.

It was held that the legislature could authorize counties and towns to levy taxes upon designated licensed occupations for local purposes, but the General Assembly itself had no power to designate callings as taxable, and tax them for State purposes, and Chief Justice Cockrill said, in Baker v. The State, 44 Ark. 137, that this distinction had never been questioned by the court, but had been recognized and approved from time to time.

In McGehee v. Mathis, 21 Ark. 40, the first case in the State bringing directly before the Supreme Court the power of the State to create levee districts, and authorize the assessment and collection of taxes upon the lands within the district, and their application to the erection of levees to protect against overflows, by a special act

of the legislature, the county of Chicot was laid off into districts, and an election was provided to be held by the people of each district for an inspector, and the inspectors of all the districts as a body, were authorized to adjust the assessment and levy of the tax, and the County Court was empowered upon their assessment to fix the rate of taxation for levee purposes. The inspectors were elected from residents of each Levee District, and their assessment was reported to the County Court—the tribunal authorized by the Constitution to assess and collect taxes for county purposes, and that court was to fix the rate of taxation. There was no attempt by the legislature arbitrarily to impose or compel the assessment of any levee tax, but the whole matter, both the assessment and levy of the tax, and the amount of it were submitted to the people of the county, as divided into Levee Districts. Al the previous legislation authorizing local assessments for public improvements, or for local purposes, it is believed, has submitted the matter of the assessment, and the levy of the taxes to the people of the locality to be immediately affected, and has allowed them to determine the questions for themselves.

The fundamental idea in a republican government that the people who are to pay the taxes must vote them, has been recognized as applicable to local assessments, or taxation for local purposes, and it has frequently been decided in the courts that the legislature of the State cannot directly, and without reference to the consent of the people of the particular locality to be affected, enact legislation imposing a debt, or liability for a debt, or an assessment, or a charge upon such locality, or its people or their property, against their will, and collect and appropriate the proceeds.

See the question reviewed in Cooley on Taxation (1st Ed.), Chap. 21, where many of the cases are cited.

Ordinarily the legislature cannot delegate the power of taxation, and the exception (if it may be called an ex-

ception) is as to counties, municipal corporations, school districts, and other governmental agents, or *quasi* corporations, designed and organized for the purposes of local administration.

The people of such localities under an express grant by the legislature of the authority to do so, may exercise powers, more or less legislative in their character, and operating directly and exclusively on themselves, or their property, including the power of local taxation, and the appropriation of the moneys collected. But the State cannot arbitrarily, and in its own discretion, enact and enforce such legislation.

Cairo & Fulton R. R. Co. v. Parks, 32 Ark. 131, 137-139.
Fluty v. School District, 49 Ark. 94.
Hudson v. Jefferson County, 28 Ark. 359, 361-364.

In speaking of a local improvement district, in Fitzgerald v. Walker, 55 Ark. 153, the court said:

"Its powers are derived directly from the legislature, and in exercising them the court acts as the agent of the property owners, whose interests are affected by the duties it performs."

And see:

Memphis Trust Co. v. Board of Directors of St. Francis Levee District, 69 Ark. 284.
City of Little Rock v. Board of Improvement, 42 Ark. 160, etc.
Cooley's Constitutional Limitations (6th Ed.), Chap. 21, p. 139, etc.
Cooley on Taxation (1st Ed.), Chap. 3, p. 48, etc., and Chap. 21, p. 747, etc.

The first essential, therefore, of the complaint in this suit was that it set out all the facts with reasonable certainty, necessary under Act No. 19 of the year 1893, to establish the right of the Board of Directors of the St.

Francis Levee District, to assess, levy, collect and dispose of the levee taxes for the several years for which the suit was brought. Each year's taxes, as appears from the legislation, was distinct and separate from every other year's taxes. In this suit, it will be noticed from the complaint, that levee taxes were sued for, for the years 1893, 1894, 1895, 1896 and 1897. The taxes for 1893, or 1894, however, on the lands of A. B. Ballard and Josephine W. Ballard were not sued for, but only the taxes on all the tracts for 1895 and 1896, and on two tracts for 1897.

It is apparent that neither Act No. 19 of the year 1893, nor Act No. 71 of the year 1895, providing for the suit to collect the levy taxes contemplated that the taxes for more than one year should be sued for in one suit. By the very terms of each act, the suit to collect the levee taxes was to be commenced (Act of 1895, p. 88) at once, if the assessments were not paid within thirty days after the first Monday of October, on which day the collector was directed to proceed to make collections.

This language could not possibly mean that the Board of Directors of the St. Francis Levee District should delay in enforcing the taxes from one year to another until as many as three, or four, or five years' taxes were due and delinquent.

But suppose we concede that more than one year's levee taxes could be sued for under the statutes regulating the suit in one suit. It certainly was necessary to set out with reference to each year's assessments, distinctly and separately, all the facts necessary to show the right to assess, levy, collect and appropriate the moneys from those assessments.

> Brown v. Board of Levee Commissioners, 50 Miss. 469.

Passing the right to assess the levee taxes, and assuming that such a right was complete when the elections

were held in the several counties, and votes cast, and counted, and returned and compared, and the result published, as prescribed in Section 5 of Act No. 19 of the year 1893 (pages 27-28), it was still necessary to follow the directions prescribed in that act, in making the assessments of the lands on which the levee taxes were to be levied, and in collecting those assessments, and in conducting the suit authorized by the act to be brought to enforce their payment.

By section 7 of the act, it was required that the lands be assessed in convenient subdivisions, as surveyed by the United States, and the assessment books were to show the names and residences of the owners of the lands, and mortgages of record on them, and a description of the lands, the number of acres cleared, as nearly as could be, and then the value of the lands as assessed without levee protection, and the value of the same lands as estimated, increased by levee protection.

Acts of 1893, p. 29.

The assessors were required (Sec. 8) to begin their assessments on the first Monday of April, and complete them by the first Tuesday of May, and then report them to the secretary of the Levee Board on or before the last mentioned day. They were then to hold a meeting at the place of business of the Levee Board on that day, after completing the assessments. They were to elect a chairman and secretary, and keep a record of their proceedings, and compare and equalize their assessments, and correct their books to conform to the equilization, and their assessments, as equalized were to be the assessment of the Levee District for that year, and until the next assessment.

Acts of 1893, pp. 29-30.

The Levee Board was then to hold its annual meeting on the same day, the second Tuesday in May, at its dom-

icile (Section 9) and seven members were to constitute a quorum for the transaction of business. The president at that meeting was to lay before the board the annual report of the chief engineer, with maps, papers and estimates accompanying it, and the last assessment showing the aggregate sum upon which a tax for levee purposes might be levied; and also a report of the treasurer of the board, showing the financial condition of the Levee District.

After an examination of the reports, the Levee Board was required to decide what work it would undertake to do during that official year, and the rate per cent. on the aggregate increased value of lands in the Levee District, that would be necessary to raise the sum sufficient to pay for such work, as provided in section 5, of the act, provided that the tax should not exceed five per cent. as proivded.

Acts of 1893, p. 30.

It is scarcely necessary to say that under the law, compliance with all the requirements of the statutes was essential to the validity of the assessment of the levee taxes, and to the right to collect them, and that all the facts showing such compliance were required to be embraced in the complaint in this suit in order to entitle the plaintiff, the Board of Directors of the St. Francis Levee District, to a decree against A. B. Ballard and Josephine W. Ballard, for the sums claimed to be due on their lands, or the sale of their lands to pay such sums.

Rector v. Board of Improvement, 50 Ark. 116.
Watkins v. Griffith, 59 Ark. 344.
Red Fork Levee District v. St. L., I. M. & S. Ry. Co. (Ark.), 96 S. W. Rep. 117.
Mulligan v. Smith, 59 Cal. 206.
Rich v. Mentz Township, 134 U. S. 634.
Zeigler v. Hopkins, 117 U. S. 683.
Merritt v. Port Chester, 71 New York 309.

Matter of Pennie, 108 N. Y. 364.
Ogden City v. Armstrong, *168 U. S. 224.*
St. Louis, I. M. & S. Ry. Co. v. Dudgeon, 64 Ark. 108.
Gibney v. Crawford, 51 Ark. 34.
Hindman v. O'Connor, 54 Ark. 627.
Morris v. Dooley, 59 Ark. 483.
Cribbs v. Benedict, 64 Ark. 569-570.
Hudson v. Jefferson County, 28 Ark. 360.

Not only were A. B. Ballard and Josephine W. Ballard entitled to have the complaint in the suit set out in language all the facts essential to show the right of the Board of Directors of the St. Francis Levee District to assess, levy, collect and dispose of the levee taxes, but they were also entitled to have the particular facts stated in the complaint, showing the particular lands they owned or claimed to own, giving the proper descriptions of them, showing that those lands had been properly assessed upon the basis prescribed in the Acts of the General Assembly, that the taxes had been properly levied on the estimated increased value of their lands, that the taxes amounted to certain sums on each tract of land, that the tax book had been delivered to the collector, that they had failed to pay these sums due as required by the statutes, that they resided, or did not reside in Crittenden County, and if they did not reside there, that they were not in the county, and that their lands had, or had not upon them occupants, and then a prayer for a personal summons as to them, or else for the public notice in the newspaper, prescribed in Act No. 71 of the Acts of 1895, so that they might be brought before the court in the manner required in the statutes.

In no other way could A. B. Ballard and Josephine W. Ballard be adequately informed even under the statutes of what was claimed in them in the suit; nor could their rights in the suit be in any other way so brought before the court as to enable the court to administer to them in the suit, upon the facts as they existed, the justice they were entitled to.

Kirby's Digest, Sec. 6091.
Games v. Stiles, 14 Peters 322, 330-332.
Stilwell v. Adams, 29 Ark. 346.
Judge Story in Bradstreet v. Neptune Ins. Co., 3 Sumner C. C. R. 601, 610, etc.
People v. Green, 55 New York 135.
Town of Mentz v. Cook, 108 New York 505, 509.
Washington R. R. v. Bradley, 10 Wallace 303.

The complaint alleged that the Board of Directors elected R. W. Barton collector of the levee taxes for Crittenden County, and that Barton as collector "on the first Monday in October, 1894, 1895, 1896 and 1897, proceeded to collect said taxes due on the lands of said Crittenden County, and that on the first Monday of October, 1894, said R. W. Barton as collector, proceeded to collect said taxes due on said lands for 1894, within said Levee District, and within the time limited by said statutes for the collection of said taxes, no taxes were paid by said defendants, nor by any one for them on their lands aforesaid, and all of said taxes on said lands of said defendants hereinbefore named in the caption to this complaint are yet wholly unpaid and are delinquent."

There was nothing further on this subject in the complaint.

Record, p. 13.

A. B. Ballard and Josephine W. Ballard or their lands were not sued for levee taxes for the year 1894, and no decree was rendered against them or their lands for levee taxes for that year, and no sale of their lands for the levee taxes for that year was made. Therefore there was no allegation in the complaint that any levee tax collector ever had the tax books containing the levee taxes on the lands of A. B. Ballard and Josephine W. Ballard for the year 1895, or 1896, or 1897, in his hands, or that he ever took any step toward collecting such taxes for

either of those years, or that the levee taxes on their lands for either of those years ever became delinquent, or were not paid when they fell due.

Following the rule established by the cases referred to, the complaint in the present suit was required to show (Acts of 1893, No. 19, Sec. 5, p. 27) that a meeting of the landowners in each county of the Levee District was held, after posting the notices prescribed, before the day fixed for the meeting, called by the directors in each county, who appointed two clerks of election. That a proposition to levy annually a tax, not exceeding 5 per cent. of the increased value or betterment, estimated to accrue from protection to be given against floods from the Mississippi River, by the levee to be constructed, on all lands within the Levee District, was submitted. That the directors and the clerks were sworn to perform their respective duties to hold the election fairly, and make returns of the election fairly, to the secretary of the Levee Board. That returns were duly made of the said election, and that the secretary, president and treasurer of the Levee Board proceeded to canvass the returns and declared the result. That it appeared from the returns that two-thirds of the land owners represented at the meetings voted for the annual assessment. That the board was satisfied that a majority of all the land owners of the Levee District was represented at the meeting. That after all this the president of the Levee Board gave notice of the fact throughout the Levee District. That the Board of Directors thereafter (Sec. 5, p. 27) assessed and levied the taxes for the years 1894, 1895, 1896 and 1897, respectively, under the authority given by the land owners at the election in 1893, or at some other election, on the increased value or betterment, estimated each year, to accrue from protection to be given against floods from the Mississippi River, by the levee to be constructed, on all lands within the Levee District. That the Board of Directors each year elected an assessor, a land owner in the Levee District, from each county in the district, who

composed a Board of Assessors for such Levee District.

Acts of 1893, Sec. 7, p. 29.

And that each assessor, for the county he represented, made each year an assessment of all the lands in the district in books provided for that purpose by the Levee Board. That the lands each year were entered upon the books of assessment in convenient subdivisions as surveyed by the United States, with appropriate columns, showing the names and residences of the owners of the lands, and mortgages of record on the lands, and also a description of the lands, and the number of acres cleared as nearly as the assessor could ascertain without measurement. The complaint *must* also show that the assessment as made each year, was (1) of the value of the land without levee protection, and (2) the value of the land as estimated, increased by levee protection.

Acts of 1893, Sec. 7.

That the assessors, respectively, made their assessments in their respective counties, beginning the first Monday in April in each year (Act of 1893, Sec. 8), and that they completed the same by the first Tuesday in May in each year (Act of 1893, Sec. 8), and reported the same to the secretary of the Levee Board on or before the second Tuesday in May in each year. (Act of 1893, Sec. 8.)

That the assessors of the respective counties, constituting the Board of Assessors, after completing their respective assessments, held a meeting at the place of business of the Levee Board, on the second Tuesday in May in each year (Acts of 1893, Sec. 8), and the president caused a notice to be published in each county, calling on all the land owners, or persons aggrieved by reason of the assessment, to appear on the day mentioned, before the Board of Assessors for the purpose of having any wrongful or erroneous assessment corrected. That

on the second Tuesday in May in each year (Acts of 1893, Sec. 9, p. 30) the assessors met at the office, or place of business of the Levee Board, and elected a chairman, and secretary, and kept a record of their proceedings. That they heard complaints made by landowners, and adjusted errors, and wrongful assessments, and compared and equalized their respective assessments, and corrected their respective books, containing the same, so as to conform to such equalization, and that the assessments for the counties, respectively, as equalized, became the assessments of the Levee District, for the purposes of taxation, for the respective years. That the Board of Directors of the St. Francis Levee District held a regular or annual meeting on the second Tuesday in May in each year, and had a quorum present, and the president laid before the Board of Directors the annual report of the chief engineer, with the maps, papers and estimates accompanying the same, and the last assessments made by the assessors of the respective counties, showing the aggregate sum upon which a tax for levee purposes might be levied, and the report of the treasurer of the Board of Directors, showing the financial condition of the Levee District. That after an examination of the said reports, the Levee Board decided what work it would undertake to do during the official year, and the rate per cent. on the aggregate increased value of lands in the Levee District, that would be necessary to raise a sum sufficient to pay for such work, as provided in Section 5 of the Act of 1893, and that thereupon the taxes sued for were assessed and levied for each year by the Board of Directors, accordingly. That the Board of Levee Directors each year elected a collector for each county, including the county of Crittenden, who was furnished by the secretary of the Board of Directors with a list of the assessments of the county of which he was collector, and that such collector proceeded on the first Monday in October in each year, to collect the assessments for Crittenden County, and that the assessments here sued for were not

paid within the thirty (30) days, and therefore, the collector in the name of the Levee Board instituted the suit in which the sales, in question here, were made.

An examination of the complaint (Record, pp. 9-13) will show that it set out very few of the essential facts. Its defects have been pointed out to some extent in presenting assignment of errors No. 4, and what is said there is referred to here.

The complaint was not entitled in the suit prescribed in the statute. That suit was to be styled, "St. Francis Levee District v. Delinquent Lands." The present suit was styled in the complaint, "Board of Directors of the St. Francis Levee District, Plaintiff, v. The Memphis Land & Timber Company, John Adams," and hundreds of other corporations and individuals, whose names followed along one after another, as defendants, without stating the residence of any one of them. This list included A. B. Ballard but not Josephine W. Ballard.

Record, p. 9.

Then followed the statement that the following named defendants were non-residents of Crittenden County, Arkansas. In this list A. B. Ballard was included, but not Josephine W. Ballard.

Record, pp. 10-11.

In neither list of names in the complaint was the name of any individual or corporation connected with any particular tract of land, nor was any one stated to own or have an interest in any particular tract. The next paragraph (Record, p. 11) changed the name of the plaintiff, and stated that "the plaintiff, the St. Francis Levee District, states," etc. This paragraph, after referring to the acts of the legislature, stated that "the following lands lying and being situated in said Levee District, said county and State, and belonging to said defendants

named in the caption of this complaint, a list of which is hereto attached, and asked to be taken as a part hereof, were duly assessed for taxation for levee purposes in the name of the said defendants, whose names are written opposite to the said tracts of land respectively, as provided by the said Acts of the General Assembly, hereinbefore referred to, and the taxes thereon being duly extended on the said tax books of said Levee District were duly returned," etc.

Record, pp. 11-12.

In the list attached, all the lands sued as delinquent in Crittenden County, were described, but there is in the present record only the list of those belonging to the parties setting up claims in the Crittenden Chancery Court, as appears in this record—that is, A. B. Ballard and Josephine W. Ballard, and Thomas H. Allen, or his assigns.

The result of not setting out a sufficient cause of action in the complaint was not merely that there was error in the Crittenden Chancery Court in rendering the decree of sale and selling the lands of A. B. Ballard and Josephine W. Ballard, which could be reversed by appeal, or on a writ of error, but that the decrees and sales were absolutely void and passed no title whatever as against them. There is a concurrence of the authorities, Federal and State, on this proposition.

Hall v. Melvin, 62 Ark. 439.
Cowling v. Nelson, 88 S. W. Rep. 914; 3 Ark. Law Rep. 381.
Collins v. Paepcke-Leicht Lumber Co., 84 S. W. Rep. 1046; 74 Ark. 81.
Railway Co. v. The State, 55 Ark. 205.
Radcliffe v. Scruggs, 46 Ark. 103.
Elsey v. Falconer, 56 Ark. 419.
Falls v. Wright, 55 Ark. 562.
King v. Chase, 15 New Hampshire 9.
Hollingsworth v. Barbour, 4 Peters 466.

Munday v. Vail, 34 New Jersey (Law) 418.
Shriver's Lessee v. Lynn, 2 Howard 57-60.

In Reynolds v. Stockton, 140 U. S. 254, the court, in passing on the validity of a judgment rendered in New York, when brought in question in New Jersey, as affected by Section 1, Article 4, of the Constitution of the United States, said:

"The requirements of that section are fulfilled, when a judgment rendered in a court of one State, which has jurisdiction of the subject matter, and of the person, and which is substantially responsive to the issues presented by the pleadings, or is rendered under such circumstances that it is apparent that the defeated party was in fact heard on the matter determined, is recognized and enforced in the courts of another State."

140 U. S. 264.

And again: "If the fact of a judgment, rendered in a court of one State, does not preclude inquiry in the courts of another, as to the jurisdiction of the court, rendering the judgment, over the person or the subject matter, it certainly, also, does not preclude inquiry as to whether the judgment, so rendered, was so far responsive to the issues tendered by the pleadings as to be a proper exercise of jurisdiction on the part of the court rendering it."

140 U. S., p. 265.

And further: "The invalidity of the judgment depends upon the fact that it is in no manner responsive to the issues tendered by the pleadings. This idea underlies all litigations. Its emphatic language is that a judgment to be conclusive upon the parties to the litigation must be responsive to the matters controverted."

140 U. S. 265-266.

The court referred to Mundy v. Vail, 34 N. J. Law 418, and cited and approved from the syllabus, the following:

"A decree in equity, which is entirely aside of the issue raised in the record, is invalid, and will be treated as a nullity, even in a collateral proceeding."

140 U. S. 266.

The court quoted from the opinion in the same case the essentials of a valid adjudication in a lawsuit, and then copied further, as follows:

"A judgment upon a matter outside of the issue must of necessity be altogether arbitrary and unjust, as it concludes a point upon which the parties have not been heard. And it is upon this very ground that the parties have been heard, or have had the opportunity of a hearing, that the law gives so conclusive an effect to matters adjudicated. And this is the principal reason why judgments become estoppels. But records or judgments are not estoppels with reference to every matter contained in them. They have such efficacy only with respect to the substance of the controversy and its essential concomitants."

140 U. S. 268-269.
See Owings v. Hull, 9 Peters 624.
Hallum v. Dickinson, 47 Ark. 124.

Finally the court said this:

"Without multiplying authorities, the proposition suggested by those referred to, and which we affirm, is that in order to give a judgment, rendered by even a court of general jurisdiction, the merit and finality of an adjudication between the parties, it must, with the limitations heretofore stated, be responsive to the issues tendered by the pleadings. In other words, that when a complaint tenders one cause of action, and in that suit service on the appearance of the defendant is made, a subsequent judgment therein, rendered in the absence of the defend-

ant, upon another and different cause of action than that stated in the complaint, is without binding force within the courts of the same State, and of course, notwithstanding the constitutional provision heretofore quoted, has no better standing in the courts of another State."

140 U. S. 270-271.
Hovey v. Elliott, 167 U. S. 409, 445-446.
Windsor v. McVeigh, 93 U. S. 282-283.

(B)

There was no sufficient affidavit made and filed to support a warning order, or order for notice to A. B. Ballard and Josephine W. Ballard.

By Act No. 71 of the Acts of 1895, any land owner residing in the county where the suit was brought, whose title papers were of record in the Recorder's office, was entitled to personal notice by summons of the suit (page 90), and any owner who was in the county, or whose land was occupied, was also entitled to personal notice (page 92), and it was only where the owner of the land was a non-resident of Crittenden County, or was unknown, that notice could be given him by publication for four weeks prior to the day of the term of the court on which final judgment might be entered for a sale of his land, in some newspaper published in the county. (Page 89.)

The clerk of the court was required to sign the notice (page 90), and he must necessarily have had some information of record, as to the fact of the residence of every alleged owner of land proceeded against, before he could issue a summons for him, or include his name in the list of the supposed owners of the lands to be made a part of the published notice, along with the description of the lands he was supposed to own, and the amounts due thereon.

Record, p. 90.

The court by the statute (page 91) was not specially required to look to or determine any question of residence of any person or corporation proceeded against as the owner of land, but only to determine whether or not the notice had been properly given. If the facts as to the residences had not previously been established *prima facie* in the suit, or even if such facts had been established *prima facie*, it still was certainly the duty of the court to inquire into those facts on the hearing, before rendering the decree of sale, and itself to determine whether or not each land owner or person having an interest in the lands proceeded against, had been brought before the court in the exact manner the law required he should be.

The legislation required that the fact of the residence of each owner of each tract of land proceeded against in the suit should be placed in the assessment (Acts of 1893, Sec. 7, p. 29), and should be brought into the record of the suit when it was begun, and in addition that it should be determined by the court on the hearing. The jurisdiction to proceed in the suit upon the notice depended on the fact of non-residence.

> 1 Greenleaf's Evidence, Secs. 483-484 and 491-493.
> County Court v. Robinson, 27 Ark. 116.
> Kirby's Digest, Sec. 1521.

Now, how should this fact of non-residence have appeared in the suit in order to authorize the clerk to sign and publish the required notice, to non-residents of the county, and the court to pass on it at the hearing?

Ordinarily a civil action is commenced in Arkansas by filing in the office of the clerk of the proper court a complaint and causing a summons to be issued thereon.

> Kirby's Digest, Sec. 6030.

The summons is not dispensed with in any case where it can be served, but only where it appears by the affidavit of the plaintiff, filed in the clerk's office at or after

the commencement of the action, that the defendant is a non-resident, or has gone out of the State, or left the county to avoid the service of a summons, or conceals himself so that the summons cannot be served.

In the last two cases—that is, where he has left the county of his residence to avoid service, or conceals himself so that a summons cannot be served—the facts may be stated in the return of a proper officer.

Upon the affidavit being filed, or upon the return, the clerk is required to make upon the complaint an order warning such defendant to appear in the action within thirty days from the time of the making of the order.

Kirby's Digest, Sec. 6055.

The warning order must be published weekly for at least four weeks.

Kirby's Digest, Sec. 6056.

The statutes cited above apply to all suits, both at law and in chancery.

The statute (Act of 1895, No. 71) provides not only that the collection of the taxes shall be enforced by chancery proceedings in a court having chancery jurisdiction, but also specially that, "said suit shall be conducted in accordance with the practice and proceedings of chancery courts in this State, except as herein otherwise provided" (page 88 and page 92), and there is no provision in the statute excepting the necessity for the filing of the affidavit.

It is true, the statute does not provide for the case of a non-resident of the State of Arkansas, but only for the case of a non-resident of Crittenden County (Acts of 1895, p. 89), yet the practice must be assimilated to the practice under the general statute, and in that view the affidavit must be filed.

This proposition has been decided in the Memphis Land and Timber Company v. The Board of Directors of St. Francis Levee District, 70 Ark. 409.

In that case the record did not show that there was any affidavit made as the foundation for the notice or the warning order against the defendants, and the court declined to hear evidence of the fact that it had been made or filed, though the offer was made to prove the loss of it out of the files, in addition to the other facts.

The court said in its opinion:

"It is said on part of appellee that in proceedings of this kind, for the collection of assessments against the land of non-residents, no affidavit for a warning order was required. But we do not concur in this statement. The statute directs that suits for the collection of these assessments 'shall be conducted in accordance with the practice and pleadings (proceedings) of chancery courts in this State,' except as therein otherwise provided. The statute then proceeds to name certain exceptions in the matter of not requiring attorneys or guardians *ad litem*, etc., but does not dispense with the necessity of an affidavit as the foundation for a warning order.

Acts of 1895, p. 88.

We conclude that an affidavit, that the defendants were non-residents of the county, was required by law as a prerequisite to the publication of a warning order against them.

As the record stands here, we must hold that the court erred in rendering a decree in this case when no affidavit for warning order was made."

70 Ark. 410-411.

This case has been repeatedly cited and approved in subsequent cases.

In the case last cited the court said:

"The complaint filed in this action is neither signed nor verified as required by the statute, and no affidavit for the warning order appears in the transcript."

70 Ark. 410.

The same is true in this case.

Record, pp. 9-14.
And see McMahan v. Smith, 69 Ark. 594.

It is true that there appears in the record what purports to be an affidavit, reading as follows:

"R. J. Williams states that he is the attorney for the plaintiff, and that the chief officers of the St. Francis Levee District are absent from Crittenden County, and that the facts stated in the foregoing complaint are true."

Record, p. 14.

The general statute requires that the affidavit of the plaintiff shall be filed in the clerk's office, before the warning order is made.

Sandels & Hill's Digest, Sec. 5679.
Kirby's Digest, Sec. 6055.

The rule is where a statute requires an affidavit, that the affidavit to be filed or used must be the exact affidavit the statute prescribes.

Beirne v. Imboden, 14 Ark. 237, 240, etc.
Marshall v. Green, 24 Ark. 411, 423-424.
Drake on Attachments, Sec. 89.
Hartely, *ex parte*, 5 Ark. 32.
Love v. McAllister, 42 Ark. 183.
Baker v. York, 65 Ark. 142.

The only exception allowed by the statute requiring the plaintiff to make the affidavit is when the party to the suit is absent from the county, or is physically unable to

attend before the court for the purpose of making the affidavit, and then the affidavit made shall state the reason for his not making it, and it may be made by an agent or attorney.

Sandels & Hill's Digest, Sec. 5749.
Kirby's Digest, Sec. 6125.

The Board of Directors of the St. Francis Levee District, or the St. Francis Levee District, could not be absent from Crittenden County, as it was a governmental agency, located by law in the territory, of which Crittenden County constituted a part. The affidavit did not state that it was absent from the county. It stated only that the chief officers "of the St. Francis Levee District are absent from Crittenden County."

The chief officers of the Levee District were not the plaintiffs in the suit. The statute, therefore, has not been complied with, and in the suit under Act No. 19 of the year 1893, and Act No. 71 of the year 1895, there can be no equivalent for what the law required with reference to the notice to be given, and a different thing cannot be substituted for that which the statute prescribed.

The permission of the statute to the agent or attorney to make the affidavit (Kirby's Digest, Sec. 6125) is, with the qualification, "unless otherwise expressed," and the language of the other section (Kirby's Digest, Sec. 6055), is "otherwise expressed" in the words, "Where it appears by the affidavit *of the plaintiff* filed in the clerk's office," clearly excluding any other affidavit for the purposes of a warning order.

Besides, the affidavit of Williams (record, p. 14) does not mention a single property owner, nor the residence of any property owner, nor state anywhere any fact indicating that it was intended to be the affidavit on which the order for notice, or a warning order in the suit, was to be based. It does not refer to a single defendant

named in the caption of the complaint, nor mention A. B. Ballard or Josephine W. Ballard.

The Board of Directors of the St. Francis Levee District, or the Levee District, is the creature of the Acts of the General Assembly, and has only the powers and rights given it by those acts, and if those acts did not authorize it to have the affidavit for the warning order or notice made and filed with the clerk, upon the filing of the complaint in the suit for the levee taxes, it was not left without remedy, but under the general statute (Sandels & Hill's Digest, Sec. 5680, and Kirby's Digest, Sec. 6056), providing, "The court may make the warning order upon the requisite facts being satisfactorily shown by affidavit, or other proof," it could have resorted to other proof, and have procured the necessary order from the court before publishing the notice to non-residents of the county, the Act No. 71 of the year 1895, required to be published in a newspaper.

A distinction was thus taken between the clerk and the court with reference to the proof or evidence on which to base a warning order, or order for notice.

The General Assembly saw proper to require the affidavit of the plaintiff in the suit, except in the cases specially excepted and specified. It is well known that fraudulent uses have been made of the power to bring absent parties into courts in suits.

The general statutes refer to persons and not to such creations as the Board of Directors of the St. Francis Levee District, in prescribing the affidavit required.

It may be that there should be a legislative provision covering its case, or the case of the State, or a county, or other corporations. But to enact such statute is the province of the legislature. Whether the General Assembly could have put into Act No. 19 of the year 1893, or Act No. 71 of the year 1895, a provision changing the general

statutes only for the purposes of the suit they provide for is a serious question. It did not do so. And the courts have no power to supply defects in legislation.

The statute, Act No. 71 of the Acts of 1895, prescribed the style of the suit authorized to be brought as "St. Francis Levee District v. Delinquent Lands."

Acts of 1895, p. 89.

The suit here was styled in the caption of the complaint (record, p. 9), and in the decree of sale of the 14th of February, 1898 (record, p. 14), "Board of Directors of the St. Francis Levee District, Plaintiff, v. The Memphis Land and Timber Company," and others named as defendants. So the suit authorized, and the suit begun, were different suits. But treating the reference in the affidavit of Williams to the complaint as making the complaint a part of the affidavit, and the statements of fact properly in the two as all sworn to by Williams, was there in them enough to constitute the affidavit required as the basis for a warning order, or notice of the suit?

The complaint in a suit must contain the style of the action, consisting of the names of the parties to it, distinguishing them as plaintiffs and defendants, and state the facts constituting the plaintiff's cause of action.

Sandels & Hill's Digest, Sec. 5715.
Kirby's Digest, Sec. 6091.
Nordman v. Craighead, 27 Ark. 369.

Under the statute there must be a statement of the facts constituting the title of the plaintiff, and also of the facts constituting the title or interest of the defendant sued; that is, the facts subjecting him to be sued, and showing what he is sued for. But is anything more properly a part of the complaint?

In this case the complaint must show "in ordinary and concise language" just what lands A. B. Ballard and

Josephine W. Ballard owned, and how they were liable for the levee taxes, and the amount claimed to be due from them, or "the complaint does not state facts sufficient to constitute a cause of action," as against them, and may be demurred to as the statute (Sandels & Hill's Digest, Sec. 5717, Kirby's Digest, Sec. 6093) provides.

The statute does not require a statement in the complaint of the residences of the plaintiffs, or the defendants.

Sandels & Hill's Digest, Sec. 5715; and
Kirby's Digest, Sec. 6091.
Fort v. Hundley, 5 Ark. 179.

And where the defendant is a non-resident, the fact must be brought into the case according to the statute, not by a statement in the complaint, but by "the affidavit of the plaintiff, filed in the clerk's office, at or after the commencement of the action."

Sandels & Hill's Digest, Sec. 5679.
Kirby's Digest, Sec. 6055.

In Gray v. Trapnall, 23 Ark. 510, it was decided that whatever may be the statements in the bill, the affidavit prescribed by the statute to procure an order of publication as against non-resident defendants is necessary to the prosecution of a suit against unknown heirs.

In McMahan v. Smith, 69 Ark. 591, it was decided that under the Statute (Sandels & Hill's Digest, Sec. 5681, Kirby's Digest, Sec. 6057), a separate affidavit filed in the suit could not take the place of a statement in the complaint that the names of the heirs of a designated person were unknown to the plaintiff, and that an order for such unknown heirs to appear in the suit as defendants could not be based on such separate affidavit, in the absence of the required statement in the complaint, and was of no force.

In Sannoner v. Jacobson, 47 Ark. 31, only an affidavit for an order of attachment in the course of a suit, made under the statute (Sandels & Hill's Digest, Sec. 325, Kirby's Digest, Sec. 345) was in question. The ground of attachment was not the non-residence of the defendant, but a different ground. The statute provided that such affidavit might be amended as to the grounds of attachment "up to and until final judgment upon the same."

Sandels & Hill's Digest, Sec. 331.
Kirby's Digest, Sec. 350.

Before the Civil Code (1868) the writ of attachment in Arkansas was original process and the beginning of a suit, and defeating the attachment where the writ was not served on the defendant personally, was defeating the suit, because the process was jurisdictional.

Gould's Digest (1858), Ch. 17.
Gibson v. Wilson, 5 Ark. 422.
Childress v. Fowler, 9 Ark. 159.
Edmondson v. Carnall, 17 Ark. 284.
Rheubottom v. Sadler, 19 Ark. 493.
Edwards v. Cooper, 28 Ark. 466, 470, etc.
Hellman v. Fowler, 24 Ark. 235.
Field v. Dortch, 34 Ark. 399, 403-405.
Richmond v. Duncan, 4 Ark. 198-199.
Halliday v. Cohen, 34 Ark. 712.

Under the Civil Code the order of attachment is only interlocutory process, or a proceeding in the course of the suit.

See Cole v. Cunningham, 133 U. S. 115-116.
Kirby's Digest, Secs. 412-424.
Halliday v. Cohen, 34 Ark. 713, etc.

In Sannoner v. Jacobson there was a contest among the attaching creditors of the common debtor as to the priority of their respective orders for attachments, made by intervention of one of such creditors in the suit of another.

The court held that the intervening creditor could not dispute the grounds of the attachment in the place of the debtor, but could avail himself only of imperfections which were unamendable and rendered the proceeding void.

The court decided these propositions:

1 There can be no attachment without a complaint.

2. Properly the affidavit for attachment should be distinct from the complaint, but both might be included in one paper.

3. That if only the affidavit was filed it would be sufficient for both complaint and affidavit if it contained all the essentials of both.

4. That an affidavit for an attachment must be positive, and if made on belief, the attachment would be quashed.

5. But as the affidavit was amendable, it was not void, and in the contest between the plaintiff in the suit, and the intervenor in the suit, would be treated as amended, and therefore unassailable.

We have no fault to find with a single one of the propositions. The subsequent cases—Lehman v. Lowman, 50 Ark. 444, and Landfair v. Lowman, 50 Ark. 446; Fortenheim v. Claflin, 47 Ark. 49; Blass v. Lee, 55 Ark. 329; Hanger v. Ives, 69 Ark. 52, and Salmon v. Mills, 49 Fed. Rep. 333—have gone no further than Sannoner v. Jacobson. And they are in accordance with the rule in Rushton v. Aspinall (Douglass 679), 1 Smith Leading Cases, Part 2 (8th Am. Edn.), top page 1445, and notes. And see Ormsty v. Ottman, 85 Fed. Rep. 492, and Wilson v. Teague, 95 Kentucky 47.

It is to be noted that it was not decided in Sannoner v. Jacobson that the complaint may dispense with the affidavit, but only that the affidavit may dispense with the complaint. But see McMahon v. Smith, 69 Ark. 591.

Treating the affidavit of Williams, and the complaint as one, what did Williams swear to in the affidavit, connecting A. B. Ballard and Josephine W. Ballard with the suit, or showing their respective residences, or that personally they were not in Crittenden County, or the particular tracts of land they owned, or in which they were supposed to have an interest, or that there were no occupants on the lands?

Josephine W. Ballard was not named anywhere in the complaint, or in the list of lands and persons owning or having interests in them, alleged to be attached to the complaint, and asked to be taken as a part of it.

Record, pp. 9-14.

After naming the defendants who were non-residents of Crittenden County (record, p. 10) the complaint stated that the lands in the list which was attached to it, and asked to be taken as a part of it, belonged "to said defendants named in the caption of this complaint," without distinguishing or separating any owner of any tract of land from the other owners, or one tract of land from another tract of land.

Record, p. 11.

In the list of owners and lands attached to the complaint there was no positive statement that any particular defendant, or any particular person, owned or had any interest in any particular tract of land. All that was said with reference to A. B. Ballard and was, after giving a supposed description of a tract of land: "Assessed to A. B. Ballard."

Record, p. 12.

It is a well known fact that lands may be assessed, for the purpose of general taxation, in the name of one person and belong to another. In fact, the court below (record, p. 83), in this very case, said that it was immaterial that the lands in controversy were the property of Mrs.

Josephine W. Ballard, and she was not made a party defendant in the suit, to enforce the collection of the taxes thereon, and that that fact did not affect the decree of sale, or the sale.

And see Merrick & Fenno v. Hutt, 15 Ark. 331.

There was nothing more in the complaint showing or tending to show that A. B. Ballard owned or had any interest in those particular tracts of land, or in any tract of land. And in this connection nothing was said as to his place of residence.

The Act of 1895, in providing for the notice in case the ownership of any of the delinquent lands is unknown, declared: "And where the owners are unknown, that fact shall be stated in said published notice." And the notice is to be given by publication where they are non-residents of the county.

Acts of 1895, pp. 88-89 and 90.

Now, how could any such fact of unknown ownership, or of non-residence of the county, be stated in any published notice, if it had not previously been stated in the complaint filed under oath, or in a separate affidavit filed in the suit?

It has been repeatedly decided, and is a self-evident proposition, that parties in interest in the subject matter of a suit, whose names or residences are not known, and who cannot be served with process to bring them before the court in the suit, cannot be brought in by publication, or a constructive notice, unless the fact is alleged, and is *prima facie* established in the suit that they, or their names, are unknown, or their residences cannot be ascertained after inquiry. Is the rule different with reference to non-residents of the county?

Greenstreet v. Thornton, 60 Ark. 373-374.
Webster v. Reid, 11 Howard 459-460.

Hollingsworth v. Barbour, 4 Peters 477, etc.
Pana v. Bowler, 107 U. S. 544-546.
Hall v. Melvin, 62 Ark. 444-445.
McMahan v. Smith, 69 Ark. 592.

It is to be noticed that by the statute (Acts of 1895, p. 89), the notice of the pendency of the suit must be given "when such suit may be (is) pending."

The suit, therefore, must be complete in itself by the filing of the complaint, and the issuing of the summons, or at least by the filing of the complaint, and the making of the order for the notice, or the preparation of the notice, before the notice can be published.

Kirby's Digest, Secs. 6033 and 6055.
Burleson v. McDermott, 57 Ark. 229.
Railway Co. v. Shelton, 57 Ark. 459.
Wilkins v. Worthen, 62 Ark. 406-407.

Can it be said truthfully that Williams made an affidavit that A. B. Ballard and Josephine W. Ballard were non-residents of Crittenden County, or were not personally therein; and that they were the owners of, or were interested in, the lands in controversy in this suit, and that there were no occupants on the land, so as to authorize a publication of the notice prescribed in the statute (Acts of 1895, pp. 89-90), to them, as persons having an interest in the said lands, that the suit was pending in the Chancery Court of Crittenden County, to enforce the collection of certain levee taxes on such lands, which lands were in a subjoined list, each supposed owner's lands being set opposite to his or her name, together with the amounts severally due from each?

The affidavit must have contained the facts mentioned to authorize the publication in a newspaper of a notice to A. B. Ballard and Josephine W. Ballard that they were required by law to appear and make defense to the suit, or the same would be taken for confessed, and judgment final entered directing the sale of their lands for

the purpose of collecting the said delinquent levee taxes, and the payment of the interest, penalty and costs allowed by law.

There was no object in giving them notice of the suit unless their interest in it was shown in the notice, and the notice could not go outside what was contained in the record of the suit, when it was given, because, as Eakin, Judge, said in Pillow v. Sentell: "The warning order is of no consequence whilst the pleadings disclose no interest in the subject matter in any of the non-residents."

39 Ark. 64.

The case of Johnson v. Hunter, 127 Fed. Rep. 219, opinion by Trieber, District Judge, involved the very decree under which the sale of the lands of A. B. Ballard and Josephine W. Ballard were made.

The positions stated above were all taken in that case, and all overruled in that opinion. But on appeal from the decree, the Circuit Court of Appeals for the Eighth Circuit overruled it, and reversed the decree, and fully sustained the positions so overruled and held the decree and sale void.

The last opinion has not been reported yet, but will be before this court on the hearing.

(C)

There was no sufficient proof of the publication of any warning order or notice to A. B. Ballard and Josephine W. Ballard filed or produced in the Chancery Court of Crittenden county, when the decree of sale of their lands was rendered.

The record shows no notice at all, and the only pretense of notice is found in the recital in the decree of sale of the 14th of February, 1898, that several hundred persons

or corporations named, including among them A. B. Ballard, but not Josephine W. Ballard, "were severally, constructively, summoned by publication in a newspaper published in Crittenden County, Arkansas, weekly, for four weeks before this day, proof of which has previously been filed herein." The record shows, by containing no such proof, that the recital was not true.

Record, pp. 15-16.
Brodie v. Skelton, 11 Ark. 131.
Coons v. Throckmorton, 25 Ark. 61.

It was decided in Kimball v. Merrick, 20 Ark. 12, which was an action on a judgment rendered in a court of Massachusetts against the defendant who was sued on the judgment in a Circuit Court of Arkansas, that the recital in the record brought from Massachusetts that the defendant had appeared at a previous term, was not sufficient evidence of an appearance to warrant a judgment by default in the suit in Massachusetts, and the judgment rendered there was denied effect in Arkansas by the Supreme Court of Arkansas.

The exact facts were that the judgment sued on was rendered on January 14, 1851, against the defendant, who appeared in the record to have been sued as a non-resident of the State of Massachusetts. It recited that the action was entered at the June term, 1849, when the defendant appeared; and thence the cause had been continued from term to term to that time, and then the plaintiffs appeared, but the defendant did not, and thereupon he was called and a judgment by default was entered against him. And see—

Brodie v. Skelton, 11 Ark. 130-131.
Games v. Stiles, 14 Peters 330, Etc.

The difference in substance between the recital of the record in the present case, as to the proof of the service of the warning order, from the recital in the record from

Massachusetts, is not perceived. Each simply stated a pre-existing fact, and not a fact transpiring in court when the record was made. The notice, if given, as we have elsewhere shown, was returnable during the January term, 1898, of the Crittenden Chancery Court, and the 14th day of February, 1898, the day on which the decree of sale was rendered, was some week or ten days after the January term of the court had ended.

Act No. 71 of the Acts of 1895, declared in words: "That notice of the pendency of such suit shall be given as against non-residents of the county * * * by publication weekly for four weeks * * * in some newspaper published in the county where the suit is pending," and then prescribed the form of the notice.

Acts of 1895, pp. 89-90.

And then in regulating the trial in the suit, provided:

"And in all cases where notice has been properly given, as aforesaid, * * * the court, by its decree, shall grant the relief as prayed in the complaint."

Acts of 1895, p. 91.

It is manifest from these statutory provisions: (1) That the notice was to be in writing in the prescribed form, and was to be given in the manner and for the time prescribed in the statutes; and (2) that the court, before rendering any decree in the suit, was to have the notice before it, and first decide the question whether or not it had been properly given, as required by the statute.

Now, how was the court to know what the notice contained if it did not see it? And how could it see the notice if it as not in the record?

And how was the court to know how often, and when, and in what particular manner it had been published, or

in what newspaper, unless evidence of those facts in some form was produced before it on the hearing in the suit before rendering the decree?

The statutes provided (Acts of 1895, p. 92): "Said suit shall be conducted in accordance with the practice and proceedings of Chancery Courts in this State, except as herein otherwise provided," and there was no exception in the statute making it unnecessary to make proof in the ordinary way of the publication of the notice in the suit.

The provisions of the general statute as to constructive service apply to Chancery Courts as well as to all other courts.

Kirby's Digest, Secs. 6055-6059.

The proof of the publication of warning orders, or notice constituting constructive service is regulated by general statutes contained in Chapter 99 of Kirby's Digest, Secs. 4919-4926.

By that law the proof of the publication of all advertisements and orders of publication, and notices, required by law, or the order of any court to be published in any newspaper, is to be made by the affidavit of the editor, proprietor, manager, or chief accountant of the newspaper, filed in the suit, with a copy of the writing annexed, stating the number of times, and the dates of the paper in which the pub ication was made.

Kirby's Digest, Sec. 4924.

As the Acts, No. 19, of the year 1893, and No. 71 of the year 1895, prescribe no particular proof of the giving of the notice, and adopt chancery proceedings for the suit, the general statutes on the subject govern.

Gallagher v. Johnson, 65 Ark. 90.
Board of Directors of St. Francis Levee District v. The Memphis Land & Timber Co., 70 Ark. 410.

In Saffold v. Saffold, 14 Ark. 408, the court established the rule which has been adhered to ever since, that the fact of the publication of constructive notice, when authorized by a statute, must be established by the evidence the statute prescribes, and that there can be no substitute for such prescribed proof.

And see Brodie v. Skelton, 11 Ark. 120.
Clark v. Strong, 13 Ark. 491.
Gibney v. Crawford, 51 Ark. 34.
Cross v. Wilson, 52 Ark. 312.
Martin v. Allard, 55 Ark. 218.
Logan v. East Arkansas Land Co., 68 Ark. 448.

In the very recent case of Beidler v. Beidler, 71 Ark. 318, the court emphasized this doctrine, saying: "This court has repeatedly held that a compliance with provisions like this (Sandels & Hill's Digest, Sec. 5679; Kirby's Digest, Sec. 6055) is an essential prerequisite to the publication of a warning order, without which no jurisdiction as to such defendants can be acquired, and all proceedings as to them are void.

Gregory v. Bartlett, 55 Ark. 30.
Memphis Land & Timber Co. v. Board of Directors of St. Francis Levee District, 70 Ark. 409.
McMahan v. Smith, 69 Ark. 591.

No warning order was made by the clerk upon the complaint in this suit, and the decree of the court as to W. J. Foster is void."

71 Ark. 322.

The rule adopted at the beginning of the State of Arkansas, with reference to the sufficiency of service of a summons, in an action, was that the officer executing it, in making his return of service, must conform to the regulations given in the statute prescribing the manner of the service, and must show with reasonable certainty, the time, place and manner of the service, and the name of

the person or party upon whom it was made, so that it might appear to the court in which the suit was, that the service was made in conformity with the provisions of the statute upon the person or party named in the writ, and in the proper manner, and at a proper time, and within the jurisdiction of the court.

Gilbreath v. Kuykendall, 1 Ark. 52-53.
McKnight v. Smith, 5 Ark. 410.
Welch v. Welch, 16 Ark. 527.
Nevada Co. v. Williams, 72 Ark. 397.
Cross, *Ex Parte*, 7 Ark. 44.
City of Fort Smith v. Dodson, 51 Ark. 447.
Rose v. Ford, 2 Ark. 26.

In early cases, it was also held that the presumption of jurisdiction attached only when it was affimatively shown by the record that the court had acquired jurisdiction over the person of the defendant in the manner prescribed by law.

Rutherford v. The State Bank, 3 Ark. 558.
Wise v. Yell, 7 Ark. 11.
Gibson, *Ex Parte*, 10 Ark. 572.
Gregory v. Bartlett, 55 Ark. 30.
McKnight v. Smith, 5 Ark. 411.

In the later case of Davis v. Whittaker, 38 Ark. 435, the record failed to show any summons, or the service of any summons, and the court said it might well hold that there was a fatal defect of parties.

It continued: "Where there has been service, the record should show it. Where there has been none, it should show an appearance. And where there are several defendants, it does not suffice to say that the 'defendants' appeared. Such a term applies only to those who have already, by service or appearance, been made parties, and does not include all who are named in the bill or complaint. It is better to name the parties defendant who come by attorney, at least once, after which the

term 'defendants' in subsequent entries may include them."

38 Ark. 438. And see
Havens v. Sherman, 42 Barbour (N. Y.) 636.

Where the record shows the actual issuance of a summons and the putting of it in the hands of the sheriff, or where it shows the proper affidavit, and the making of the proper warning order by the court, or the clerk, the service of summons in the one case, and the fact of publication in the other, has in certain cases, and especially after a long lapse of time, been presumed in support of the judgment or decree, when brought in question collaterally.

Thus in Boyd v. Roane, 49 Ark. 398, the record showed a summons had been issued against infants, and that the court had appointed a guardian *ad litem* for them. The decree of foreclosure recited that the parties came by their respective attorneys, and that it was made by consent. The court presumed the service of process, and that the guardian *ad litem* appeared for them after the service.

49 Ark. 409.

In Love v. Kaufman, 72 Ark. 265, the complaint contained an indorsement, "filed March 12, 1900, and writ signed," with the signature of the clerk of the court thereto. There was a judgment by default, and the defendants appealed to the Supreme Court. The appellant contended that the record did not show any service of summons, or that the court had jurisdiction over the person. The decree recited that the defendant was duly served with summons, as required by law. The court presumed, as the summons had been issued, and the record showed that the defendants afterwards appeared, that the summons had been served.

But we have not been able to find any case where the issuance or the personal service of summons was presumed, where it had not been shown by the record that the summons had in fact been issued. Nor have we found a single case where publication of notice to an absent or non-resident defendant, or constructive service upon him, was presumed, where the record failed to show that the court, or the clerk made an order in fact for notice or constructive service and required its publication.

In Applegate v. Lexington & Carter Co. Mining Co., Justice Woods, delivering the opinion, at the conclusion, said:

"The result of the authorities, and what we decide, is that where a court of general jurisdiction is authorized in a proceeding, either statutory or at law, or in equity to bring in by publication, or other substituted service, non-resident defendants, interested in, or having a lien upon property, lying within its territorial jurisdiction, but is not required to place the proof of service upon the record, and the court *orders* such substituted service, it will be presumed in favor of the jurisdiction that service was made *as ordered*, although no evidence thereof appears of record, and the judgment of the court, so far as it affects such property, will be valid."

117 U. S. 270-271.

It will be noticed that the opinion emphasized the fact that, "the court ordered such substituted service." In such case the presumption (especially after a long lapse of time) is indulged that the service was made.

See, also: Voorhees v. Bank of U. S., 10 Peters 469, 471.
Foster v. Givins, 67 Fed. Rep. 690, 692-693.
Eltonhead v. Allen, 119 Fed. Rep. 126, 129.
Koons v. Bryson, 69 Fed. Rep. 277, 301.

The point was made plainer in the opinion, where Justice Woods took the distinction between the case before the court, and Galpin v. Page, saying after the statement copied above: "Galpin v. Page, 18 Wallace 350, cited by counsel for defendant, is not in conflict with this proposition. The judgment set up on the one side and attacked on the order in that case *was rendered on service by publication.* The law permitted *service* to be made *by publication* only where certain facts were made to appear to the satisfaction of the court, and the court *by a precedent order,* which must necessarily *appear of record,* authorized service to be made by publication. But the *record showed no such order,* and the publication, therefore, was the unauthorized act of the party, *and appeared affirmatively* to be invalid and ineffectual."

117 U. S. 271.

The provisions contained in both the Act No. 19 of the year 1893, and No. 71 of the year 1895, that the suit authorized be brought in a court having chancery jurisdiction, and be conducted in accordance with the practice and proceedings of chancery courts, in the absence of any provision to the contrary in either of the acts, were sufficient to require service of process upon, or notice to, the owners of the lands, or those having interests in the lands proceeded against, as defendants, in the suit to recover the levee taxes.

From the organization of the Chancery Court in England, as a court separate from the courts of common law, that court in every suit required the service of process upon, or the giving of personal notice to the defendant in the suit, or the parties to be affected by the proceedings and decrees, and declined absolutely to proceed with the suit as against any absent party who had not been served with process, or had not been given notice of the suit.

Innovations upon that rule have been made by statutes, but the rule where no statute makes a provision to the contrary is still recognized there.

Under the first Constitution of Arkansas (1836), Article 6, Section 6 (which is the same as Section 15, Article 7, of the present Constitution), the courts held that chancery jurisdiction was vested in the circuit courts (courts of chancery not then being established), and that such jurisdiction was to be exercised in all cases where adequate relief could not be had at law, and that the proceedings should be according to the rules, usages and practice of courts of chancery, except where there might be some other provision by law.

Bentley v. Dillard, 6 Ark. 79.
Hempstead v. Watkins, 6 Ark. 317, 356, etc.
Kennedy, *Ex Parte*, 11 Ark. 598.

The Revised Statutes of the State, which was its first authorized collection of the Acts of its Legislature, contained a chapter regulating the bringing and conducting of suits in chancery, and that chapter, with the additions made to it by legislation, may be found in Gould's Digest of the Statutes (1858, Chapter 28), which contains the last authorized compilation of the statutes of the State preceding the adoption of the Civil Code, which went into force in the year 1868. That Code, in substance, abolished chancery jurisdiction, considered separately, and required all suits to be brought and conducted in the Circuit Court, in the same form, with the qualification that the Circuit Court was to exercise the jurisdiction formerly belonging to chancery courts, but in the method prescribed in the statutes, where they had changed or modified the former practice.

By the statutes regulating chancery jurisdiction and practice, before the Code, the suit was begun by filing a bill, or petition, and then regularly a supena was issued, commanding the sheriff to summon the defendant. Service of that subpena was made by giving the defendant a copy, or leaving it at his usual place of abode, with a designated person, and telling him the contents. If there were unknown heirs, they might be proceeded against

without naming them as defendants, or if the defendant was a non-resident of the State, he might be proceeded against as such.

In such cases personal service of process was dispensed with, but in each case an affidavit of the facts was to be filed in the suit. As to unknown heirs, the court was authorized to make such an order as to notice as it deemed proper. As against a non-resident, the court or the clerk made an order to be published, directed to him, notifying him of the pendency of the suit, and requiring him to appear on a day named and make defense, allowing sufficient time for publication, or the bill would be taken for confessed. If the sheriff made return on the subpena, that the defendant could not be found, then, also, the order for notice might be made. The time and manner of the publication of the notice were prescribed.

By declaring that the suit provided for should be conducted in accordance with the practice of chancery courts in the State (Act of 1895, Sec. 2, page 92), it was recognized that there was an established chancery practice, and conformity to it necessarily required the service of process, or the giving of notice as prescribed in that practice.

This proposition was recognized in Carson v. The Board of Directors of the St. Francis Levee District, 59 Ark. pp. 535-536.

And see:

Memphis Land and Timber Co. v. Board of Directors of St. Francis Levee Dist., 70 Ark. 410.
Banks v. Board of Directors of St. Francis Levee Dist., 66 Ark. 492.

But Act No. 71 of the Acts of 1895, by its specific provisions, removed any doubt on this subject.

It was held in County of San Mateo v. Southern Pacific R. R. Co. (the Railroad Tax Cases), 13 Fed. Rep. 722

(opinion by Justice Field), that the Fourteenth Amendment to the Constitution imposes a limitation upon the exercise of all the powers of the State, which can touch the individual or his property, including among them that of taxation, and the law enacted must direct, and there must be some kind of notice to the owner and an opportunity to him to be heard, before he can be deprived of his property directly, or a charge or liability can be created upon it, which may be the basis of taking it, whether the proceeding is judicial or administrative. (Pages 750-753.)

> And see Black on Tax Titles (1st Ed.), Sec. 42, and Blackwell on Tax Titles (2d Ed.), Chap. 12, p. 213, etc.

The attempt of the court below to distinguish the overdue tax act (Acts of Arkansas, 1881, No. 39, p. 63) from the Act No. 71 of the Acts of Arkansas of 1895, p. 88, in question here, with respect to the necessity of the order for the notice, or the notice of the suit appearing of record in the suit, in view of the provisions of the general statutes, and the principles of law to which we have called attention, cannot be sustained.

The provision in Section 2 of the Act of 1881 (Acts of 1881, p. 65) that the clerk of the court on the filing of the complaint should enter on the record the order for notice of the suit, was no more peremptory or mandatory than the provisions in the Act of 1895 that "notice of the pendency of such suit shall be given as against non-residents of the county and unknown owners, respectively, when such suits may be pending, by publication weekly, for four weeks * * * in some newspaper published in the county," and then prescribing the form of the notice, which must necessarily have been in writing, and prescribing in the notice the style of the suit, namely, "St. Francis Levee District v. Delinquent Lands, Notice," and then, as a part of the form, leaving a blank for the signature of the clerk, and under that blank

placing the words "Clerk of said Court," and having the notice state in the body of it that a suit was pending in the designated court, to enforce the collection of certain levee taxes, and that the list of the lands was subjoined, and each supposed owner's name was set opposite his or her lands, with the amounts severally due from each. And the provisions just stated are reinforced by the further provisions (page 90) that the suit should stand for trial at the first term after the complaint was filed as to non-residents of the county, and unknown owners, only if the four weeks of publication in a newspaper had expired before the first day of the term, or during the term of the court to which the suit was brought, and the final provision limiting the power of the court to decree the sale of the land as prayed in the complaint (page 91) to "cases where notice has been properly given, as aforesaid," unless the owner appeared and filed an answer.

The court below, in its opinion (record, p. 83), stated that the act under which the proceedings were instituted does not require a warning order to be entered on the record, or the complaint, and if it did, that the proceedings could not be attacked collaterally, unless such entry was made jurisdictional, as it was in the case of Gregory v. Bartlett, 55 Ark. 30, and that that was not done in this case, citing Clay v. Bilby, 78 S. W. Rep. 749, and 72 Ark., p. 101.

We will present here only the question whether the order for the notice, or the notice of the suit, was required by the law to be entered of record in the suit, as the other question has been presented in another place.

The court speaks of a "warning order" as if the notice required by Act No. 71 of the Acts of 1895 was an ordinary warning order. It is necessary only to read that act, and then the statutes regulating the constructive service of process (Kirby's Digest, Secs. 6055-6059)) to see that the two are entirely distinct, and the one does not contain what the other does.

In Arkansas the order of publication for an absent or non-resident is technically termed a "warning order," and it is so designated in the statutes, and is an order made by the clerk upon the complaint, warning the defendant to appear in the action within thirty days from the making of the order, and nothing more. That such an order, and the affidavit on which it is based, are *not* required to be entered on the record of the suit, no one would insist, as the courts have repeatedly decided the contrary, as shown elsewhere, and the statutes so declare.

The court, therefore, could not have meant that an ordinary warning order need *not* be put of record, but intended to designate the notice required by Act No. 71 of the Acts of 1895 as "a warning order." It is to be observed that the statute did not give the notice that name, and prescribed for it requisites wholly outside any ordinary warning order.

The statute creates courts of record, and among them designates chancery courts.

Sandels & Hill's Digest, Sec. 1289.
Kirby's Digest, Sec. 1513.

It declares that full entries of the orders and proceedings of all courts of record of each day shall be read in open court on the morning of the succeeding day, except on the last day of the term, when the minutes shall be read and signed at the rising of the court.

Sandels & Hill's Digest, Sec. 1295.
Kirby's Digest, Sec. 1519.

A court of record is defined to be: That where the acts and judicial proceedings are enrolled, or recorded for a perpetual memorial and testimony, which rolls are called records of the court, and are of such high and supereminent authority that their truth is not to be called in question. For it is the settled rule and maxim, that nothing shall be averred against the record, nor shall any

plea, nor even proof, be admitted to the contrary, and if the existence of a record be denied, it shall be tried by nothing but itself—that is, upon bare inspection, whether there be any such record or no—else there would be no end of disputes. But if there appear any mistake of the clerk in making up such record, the court will direct him to amend it.

3 Blackstone's Commentaries, *p. 24.
11 Cyclopedia of Law & Procedure, p. 657, etc.
Hahn v. Kelly, 34 Cal. 42, etc.; 94 Am. Decisions, 742.

Hahn v. Kelly is not in accordance with the rulings in Galpin v. Page. It was one of the cases cited before this court on the argument of Galpin v. Page, and its doctrine, so far as it is inconsistent with Galpin v. Page, was overruled.

The record is a history of the most material proceedings in the cause, entered formerly on a parchment roll (but now ordinarily on paper), and continued down to the present time, in which must be stated the writ of summons, all the pleadings, the declaration, plea, replication, rejoinder, and whatever further proceedings have been had—all entered *verbatim* on the roll, and also the issue or demurrer and joinder therein.

3 Blackstone's Commentaries, *p. 317.

All orders of the court not entered of record are extra judicial and void. And where a court consists of several judges, a transcript of the record should show that there were justices enough to constitute a court, and therefore, having authority to make or cause to be made, a record of the court.

11 Cyclopedia of Law & Procedure, p. 762, etc.
Medlin v. Platte Co., 8 Mo. 235, 40 Am. Decisions 135.

The statute of Arkansas from the beginning of the State has been that "all writs, process proceedings and records in any court shall be in the English language, except that the proper and known name of process, and technical words may be expressed in the language heretofore and now commonly used, and shall be made out on paper or parchment, in a fair and legible character, in words at length, and not abbreviated, but such abbreviations as are now commonly used in the English language may be used, and numbers may be expressed in Arabic figures with Roman numerals in the customary way."

Sandels & Hill's Digest, Sec. 1297.
Kirby's Digest, Sec. 1521.

In Lenox v. Pike, 2 Ark. 14, the court decided that whatever proceedings, or facts the law or the practice of the courts require to be enrolled, constitute and form a part of the record, such as all judicial writs and process, the finding of the jury, the judgment of the court, and the like.

2 Ark. 20.

In Rose v. Rose, 9 Ark. 507, it was held that depositions filed in a chancery cause and read in evidence, constitute a part of the record in the cause, without being made so by bill of exceptions. (Pages 512-513.)

In Lemay v. Johnson, 35 Ark. 225, 230, the court held that all papers properly filed in an equity cause become parts of the record.

In Floyd v. McDaniel, 36 Ark. 484, it was held that depositions and other papers on file are parts of the record of a chancery cause, as well as the pleadings.

In Casteel v. Casteel, 38 Ark. 477, it was held that under the present system, every paper properly filed in a chancery cause, becomes a part of the record.

If it was not necessary to file the proof of the publication of the notice in the suit, why did the court in its decree of sale of the 14th of February, 1898 (Record, p. 16), recite as a fact *that proof* that the non-resident defendants "were constructively summoned by publication in a newspaper published in Crittenden County, Arkansas, weekly for four weeks before that day * * * had previously been filed herein?" Was the filing necessary, or only an idle ceremony?

The proof not appearing in the record, the recital of the court could not supply its place.

Pillow v. Sentelle, 39 Ark. 61.
Lusk v. Perkins, 48 Ark. 239.
Nevada County v. Williams, 72 Ark. 397.

Now, would it not be anomalous, and indeed unprecedented, if the legislature intended that no record should be made in the suit of the notice, after prescribing the essentials of it, with the particularity appearing in the statute, and especially prescribing that the giving of it should be a condition precedent to the decree?

What is the difference or distinction in character, or effect, from a legal standpoint, with reference to notice of the suit, to the parties to be affected by the sale to be made under it, between the suit provided for in the overdue tax act of 1881, and the suit provided for in Act No. 71 of the Acts of 1895? We can see none.

And if the rights of the owners of the lands proceeded against in the suit provided for in the former act required the order for the notice, and the notice published to be made a part of the record of the suit, it is certainly true that the rights of the owners of the lands proceeded against in the suit provided for by the latter, required also, that the order for the notice, and the notice, should be put of record.

In McCarter v. Neil, 50 Ark. 191, Justice Smith stated, that the authority "over the landowner was acquired by

the filing of the complaint, stating that taxes were due on the particular tract, and by the publication of the required notice, which took the place of ordinary process to bring the parties into court."

In Gregory v. Bartlett, 55 Ark. 30, the court held that the court acquired no jurisdiction of the land proceeded against, and that its proceedings were void, although the proper order had been published in a newspaper, as required, because the clerk had failed to enter the order on the record, before publishing it. In this connection the court said: "The statute under consideration, required the order which authorized the publication, to appear of record. There is no evidence of it in the transcript, which purports to be a complete record of the proceedings in the over-due tax case. As the statutes require the order to appear of record, and it does not, no presumptions in its favor are indulged."

55 Ark. 36.

When this court came to consider a similar case from Arkansas, in Dick v. Foraker, 155 U. S. 404, it followed the decision in Gregory v. Barlett, and quoted largely from the opinion, and held the statutory notice, required by the overdue tax act of 1881, in proceedings for the fixing of tax liens for unpaid taxes upon lands, and the sale of the lands for the payment of them was essential, and that the court could take no jurisdiction of the suit until the notice was given and that all its proceedings in the suit in the absence of the required notice, were void.

In Pope v. Campbell, 70 Ark. 307, an overdue tax sale was in question, and the proper order for the notice to be published had been entered by the clerk upon the record, but instead of putting it upon the record of the proceedings of the court when sitting as a chancery court, he put the entry in the record of the same court when proceeding as a court of law, and the court held the order void, and the publication of the order made under it void,

and that the court had proceeded in the suit without jurisdiction.

It has already been shown by reference to the statute, that a suit is not ordinarily commenced in Arkansas until the filing of the complaint, and the issuing of a writ of summons. The early cases held, and it has been followed in the later cases, that the suit was not begun until the filing of the declaration at law, or the bill in chancery, and the issuing of the summons, or where constructive service was resorted to as against absent or non-resident defendants, until the order for notice had in fact been made, and had been published as required by the statute.

State Bank v. Cason, 10 Ark. 479.
Montgomery v. Birge, 31 Ark. 493.
Hale v. Warner, 36 Ark. 221.

Clay v. Bilby, 78 S. W. Rep. 749, and 72 Ark. 101, was an attack upon a sale made under a decree in an overdue tax suit, brought under Act No. 39 of the year 1881, Acts of Arkansas of 1881, p. 65. The defects in the complaint are pointed out in the opinion (72 Ark. 104-106), and among them, that the land was sold on the 17th day of May, 1883, in the suit, and that the suit brought to set aside the sale was commenced on the 14th day of April, 1899, lacking one month and three days of being sixteen years after the sale was made. The complaint attacked the decree under which the sale had been made only on the ground that the affidavit filed, to prove the publication of the notice in the suit, was not made by the publisher of the newspaper in which the notice was published, and it did not state that the newspaper was printed in the county, or that it had a *bona fide* circulation therein for the period required before the first publication.

72 Ark., pp. 104-106.

It is to be noticed that the affidavit objected to, was not an affidavit required to be filed at or before the beginning

of the suit, to obtain jurisdiction, or an affidavit required as the basis for the notice to be published, or given of the suit, but was an affidavit to prove the service, or publication of the required notice, after the suit had been begun, and when it was pending, and therefore, was only a step or proceeding in the suit, of which the court already had jurisdiction. See

Webster v. Daniel, 47 Ark. 142, etc.
Gregory v. Bartlett, 55 Ark. 35.

The case of Gallagher v. Johnson, 65 Ark. 90, had decided, in a suit similar to Clay v. Bilby: (1) That the proof of the publication of the notice was regulated by the general statutes on the subject; and (2) that the sale under the decree for the overdue taxes was null and void, because the proof of the publication of the notice was insufficient to give the court jurisdiction in the overdue tax suit, the insufficiency consisting only in the fact that the affidavit filed failed to state that the newspaper had the required circulation.

In Clay v. Bilby, Gallagher v. Johnson was overruled on the second point decided in that case—that is, the insufficiency of the affidavit to support the decree, and no doubt correctly as the case presented, was not one where no affidavit at all had been made, but only where an affidavit had been made which in certain particulars was not the affidavit required by the statute, but in other respects stated the necessary facts and was not an affidavit on which the notice of the suit had been based.

A distinction has frequently been taken between the total want of any affidavit, where an affidavit is required before the commencement of a suit, or special proceeding, or as the foundation of a notice to an absent or non-resident party of the bringing of the suit, and an affidavit to be filed after the beginning of the suit, and when it is pending, required as the basis for the progress or further prosecution of the suit, which is merely defective

in some particular, but contains in other respects, substantially, the facts required. In the one class of cases, it has been held that the jurisdiction is defeated, or never attached; while in the other—that is, where there is only a defect in the affidavit filed in the course of the suit—the defect has been treated merely as an irregularity, and as amendable, and as not defeating, or preventing the attaching of the jurisdiction.

The distinction we take appears in the following cases, and others referred to elsewhere:

Edmondson v. Carnall, 17 Ark. 284.
Hellman v. Fowler, 24 Ark. 235.
Williams v. Skipwith, 34 Ark. 529.
Byers v. Fowler, 12 Ark. 271-272.
Sannoner v. Jacobson, 47 Ark. 31.
Ormsby v. Ottman, 85 Fed. Rep. 492.

Justice Field noticed it in Pennoyer v. Neff, 95 U. S. 720-721.

The case of Clay v. Bilby might very well have been put solely upon the ground of the defects in the complaint, and the great lapse of time between the rendition of the decree, and the bringing of the suit making the attack upon it, especially in view of the statute regulating the suit which provided: "The strict rules of law relating to the jurisdiction of courts in special statutory proceedings shall not be applied to proceedings under this act, but all presumption shall be in favor of the jurisdiction of the courts in which they are had, and of their regularity in all respects."

Acts of Arkansas of 1881, p. 72.
Williams v. Bennett, 75 Ark. 312.

The only point before the court in Clay v. Bilby, outside the defects in the complaint, and the long lapse of time since the rendition of the decree attacked, was the defect in the affidavit filed, to prove the publication of

the notice in the suit in which the decree had been rendered, and the court virtually confined its decision to that question, announcing finally: "Our conclusion is that the defect in the affidavit made to prove the publication of the warning order in this case, was a mere irregularity, which did not affect the jurisdiction of the court, or the validity of the decree in question."

72 Ark. 113.

It is difficult to understand what the court meant by the statement in Clay v. Bilby, that "In Gallagher v. Johnson, 65 Ark. 90, a doctrine not in harmony with previous rulings of this court was announced" (72 Ark. 109), when in the same volume of reports, there were the cases of Baker v. York, 65 Ark. 143, Miller Co. v. Gazola, 65 Ark. 353, and a decision by the same court and the same judge—Thompson v. Scanlan (1891), 16 S. W. Rep. 197—all, if we understand them, substantially supporting the doctrine announced in Gallagher v. Johnson, and overruled in Clay v. Bilby, but neither of them noticed in the latter opinion.

And see Saffold v. Saffold, 14 Ark. 408, decided as early as the year 1854.

Lawrence v. The State, 30 Ark. 719.
Pillow v. Sentelle, 39 Ark. 61.

(D)

The decree of sale does not state, and the record does not show the facts essential to the validity of the decree of sale, as against A. B. Ballard and Josephine W. Ballard, or their lands, and thereby they have been denied the benefit of the laws of the State of Arkansas, applicable to the facts of their case, in violation of the Constitution of the United States, whereby they have been deprived of their property without due process of law.

That the suit authorized by the two acts of the General Asembly, Act No. 19 of the year 1893, and Act No. 71

of the year 1895, and the suit shown by this record, is not an ordinary suit at law, or an ordinary suit in equity, but is a statutory, special and summary proceeding out of the usual course, depending wholly for validity upon the authority of the two acts of the General Assembly, is a proposition which will be assumed here, and will not be argued further in this connection.

The principle established by the decisions, is that where the jurisdiction is special and limited, or the proceeding is summary, and not according to the usual or ordinary course, and the defendant is brought into the court, in the suit or proceeding, by the constructive service of process, or a published notice only, and enters no personal appearance, the judgment or decree pronounced does not bind him at all, personally, nor does it bind his property, or affect his rights, unless the court has obtained possession of the property it undertakes to control, or dispose of, nor even then unless every requisite prescribed in the particular statute, authorizing the suit, or proceeding, with reference to the property proceeded against, not only existed in fact, but is recited in the judgment or decree, or is shown elsewhere in the record of the suit, or proceeding to have existed, or to have been true.

In Galpin v. Page, 18 Wallace 350,, Justice Field, first stated the presumptions which attach to the proceedings of a Superior Court of general jurisdiction, proceeding within the general scope of its powers, where nothing appears in its record to the contrary and stated the exception where the record states the evidence of the jurisdiction, or makes an averment with reference to it, which shows that jurisdiction did not exist, and the further exception that the presumptions as to jurisdiction are not indulged in, even as to Superior Courts of general jurisdiction, with reference to persons who appear in the record not to have been within the jurisdiction of the court, or subject to its process, nor as to proceedings

which are not in accordance with the course of the common law, and the necessity that there should be a strict and literal compliance with the statutory provisions, when by the legislation of a State, constructive service of process by publication is substituted for personal citation and then referred to the case of Morse v. Presby, 5 Foster (N. H.) 302, and quoted from it as follows:

"A court of general jurisdiction may have special and summary powers wholly derived from statutes, not exercised according to the course of the common law, and which do not belong to it as a court of general jurisdiction. In such cases, its decisions must be regarded and treated like those of courts of limited and special jurisdiction. The jurisdiction in such cases, both as to the subject matter of the judgment, and as to the persons to be affected by it, must appear by the record, and everything will be presumed to be without the jurisdiction which does not distinctly appear to be within it."

After making the quotation, Justice Field said: "The qualification here made, that the special powers conferred are not exercised according to the course of the common law, is important. When the special powers conferred are brought into action, according to the course of that law—that is, in the usual form of common law and chancery proceedings, by regular process, and personal service, where a personal judgment or decree is asked, or by seizure, or attachment of property, where a judgment *in rem* is sought, the same presumption of jurisdiction will usually attend the judgments of the court, as in cases falling within its general powers."

Such is the purport of the language and decision of this court in Harvey v. Tyler, 2 Wallace 332. But where the special powers conferred are exercised in a special manner, not according to the course of the common law, or where the general powers of the court are exercised over a class not within its ordinary jurisdiction, upon

the performance of prescribed conditions, no such presumption of jurisdiction will attend the judgment of the court. The facts essential to the exercise of the special jurisdiction must appear in such cases upon the record."

18 Wallace 371.

In Gibney v. Crawford, 51 Ark. 34, the court quoted and adopted the substance of what we have quoted from Justice Field's opinion, 51 Ark. 39-40.

And see further:

Trice v. Crittenden Co., 7 Ark. 159.
Hudson v. Jefferson Co., 28 Ark. 362.
Bush v. Visant, 40 Ark. 130-132.
Lusk v. Perkins, 48 Ark. 239, 246.
Cross v. Wilson, 52 Ark. 312.
Morris v. Dooley, 59 Ark. 486-489.
Games v. Stiles, 14 Peters 322, 328, etc.
Earley v. Doe, 16 Howard, 618-619.
Ransom v. Williams, 2 Wallace, 318-319.
Deputron v. Young, 134 U. S. 256-257.
Guaranty Trust Co. v. Green Cove R. R. Co., 139 U. S. 147-148.
Thatcher v. Powell, 6 Wheaton, 119.
Sabariego v. Maverick, 124 U. S. 292-296.
Williams v. Peyton, 4 Wheaton 77.
McClung v. Ross, 5 Wheaton 116.
Cissell v. Pulaski Co., 10 Fed. Rep. 893.

In Hogins v. Brashears, 13 Ark. 242, the land was sold for taxes on a day different from that prescribed in the statute for such sales. The County Court had power upon good cause shown to fix another day for the sale. The deed made by the collector, under the sale made, did not recite that the County Court had fixed any day for the sale. The deed was held not competent evidence to sustain the title of the purchaser in his suit to recover the land.

In that case the court, after recognizing its duty to uphold tax titles by every liberal intendment consistent

with the rules of law, said: "Nevertheless, we have no authority to depart from these rules of law in order to sustain any pretended sale of property by a collector of taxes under color of his office beyond the true boundary of his authority. And this, in reference to the sale of lands, is no general authority to sell, but only to sell such lands as are liable by law to be sold for taxes; and these only in the manner prescribed by law. And thus he may not only pass his defined boundary in the act of selling, but in the mode of the act; and when he does so, his acts, although under color of authority, are in law but the private acts of a private person. The party, who sets up title, must furnish the evidence necessary to support it. When, for this purpose, he relies upon a tax collector's grant, whose authority is not general but limited, as we have seen, both in its scope and in the mode of its exercise, to sustain its operative force as such, he must exhibit all the substantial prerequisites to his authority to make the grant. Because it is alone from these substantial prerequisites, that the authority to make the grant can spring, and beyond their pale it can have no vitality. Hence the rule in such cases of authority, whether entrusted to an officer or to an individual, that it must be strictly pursued and strictly proved. And hence, too, the obligation upon one setting up such a grant to show the performance of these substantial prerequisites, nothing being presumed as to their performance. Nor has any legislature changed these general rules of law as to tax collector's authority, otherwise than in prescribing the mode in which the performance of these prerequisite acts shall be shown by recitals to be contained in the deed prescribed, and declaring its effect, when so executed, both as an operative grant and as an instrument of evidence to sustain its operation as such. And, having done so, has left no ground to presume that any other mode of sale and grant was intended to be set on foot or provided for, for lands sold for taxes by the tax collectors. When tested by these principles,

the recitals contained in the alleged deed in question, after allowing every aid that can be afforded them by the liberal provisions of the statute above quoted, fall far short of a statement of all the substantial prerequisites of the tax collector's authority to sell and convey the land in question. And to this extent at least, the recitals in such a deed must be regarded as one of its essential elements."

13 Ark. 250-251.

These rules have never been overturned, but have been recognized in great numbers of cases.

The decree of sale of the 14th of February, 1898, in question, therefore, was not *prima facie* valid with reference to the sales involved here, but was defective and insufficient in not expressly finding and determining in substance the following facts:

(1) That A. B. Ballard and Josephine W. Ballard, or some of the other defendants claimed (Acts of 1895, p. 88) and were shown by the complaint to be the owners of or interested in the lands in controversy here, decreed to be sold, and that the court gave judgment against them for the amounts of the levee taxes, and interest and penalties and costs, for that reason.

(2) That A. B. Ballard and Josephine W. Ballard, or some of the other defendants were shown in the complaint, and by an affidavit duly sworn to and filed in the suit, to be, and that the fact was they were non-residents of Crittenden County, and that they were not to be found therein, and that there was no occupant of any of the tracts of land.

(3) That the clerk of the Chancery Court had made upon the complaint, or elsewhere of record in the suit, or else the court had made a warning order, or an order for the giving of the notice to the defendants in the suit

for the levee taxes, and among them to A. B. Ballard and Josephine W. Ballard, as prescribed in Act No. 71 of the Acts of the year 1895.

(4) That notice of the pendency of the suit for the levee taxes had been properly given, as against the defendants therein warned or notified, and among them, as against A. B. Ballard and Josephine W. Ballard, as non-residents of Crittenden County, when the suit was pending, or after it had been brought, by publication weekly, for four weeks, prior to the 14th day of February, 1898, when the decree was entered, for the sales of the lands here sued for, as the lands of A. B. Ballard and Josephine W. Ballard, in some newspaper giving its name, or style, published in Crittenden County, as required by the statute, Act No. 71 of the Acts of the year 1895, and that due proof of that fact, as required by law, had been made and filed in the suit.

(5) That such notice so published in the suit was in the form and contained the substance prescribed in the Statute, Section 1, Act No. 71, of the Acts of the year 1895.

(6) That A. B. Ballard and Josephine W. Ballard were included in the notice as published in the suit, and were thereby notified as persons having or claiming an interest in the lands which were decreed to be sold, that the suit was pending in the Chancery Court of Crittenden County, to enforce the collection of the levee taxes on their lands, the numbers thereof being set opposite their names in the notice as published, together with the amounts severally due from them for the taxes, penalties, interest and costs on such lands.

(7) That the notice as published in the suit, concluded, as was required by the statute, and that thereby A. B. Ballard and Josephine W. Ballard were notified that they were required by law to appear and make

defense to the suit, or the same would be taken for confessed, and judgment final would be entered directing the sale of their lands for the purpose of collecting the delinquent levee taxes, together with the interest, penalties and costs allowed by law.

(8) That the complaint in the suit had been filed and four weeks thereafter had expired as to A. B. Ballard and Josephine W. Ballard, who were non-residents of Crittenden County, before the first day of the then term of the Chancery Court, or else before the 14th day of February, 1898, when the suit was tried as to A. B. Ballard and Josephine W. Ballard's lands, and the decree of sale entered.

(9) That on the hearing in the suit, before the decree of sale was entered, A. B. Ballard and Josephine W. Ballard, being non-residents of Crittenden County, and not having been personally served with process in the suit, and not having appeared therein, the allegations of the complaint had been established as to them, or their lands, by proof then heard, which the court deemed sufficient for the purpose, thereby excluding the idea that such allegations had been taken *pro confesso*.

Our position is that the two acts of the General Assembly, No. 19 of the Acts of 1893, and No. 71 of the Acts of 1895, and the Constitution of the United States, and the Constitution of Arkansas, required the court to find that all the facts, contained in the propositions just stated, existed, before pronouncing the decree of sale in the suit for the levee taxes, or proceeding to sell the lands of A. B. Ballard and Josephine W. Ballard, and such being the case, also required that the decree of sale should state that all such facts were found by the court to be true, and that the court not having done so, such decree was void, and the sales and deeds made under them are void.

McDermott v. Scully, 27 Ark. 226.
Thompson v. Scanlan (Ark.), 16 S. W. Rep. 197.
Little v. Herndon, 10 Wallace 26.
Williams v. Skipwith, 34 Ark. 529.

VI.

The ninth assignment of errors is that the decree of the 14th of February, 1898, under which the lands of A. B. Ballard and Josephine W. Ballard were sold to Hunter and Hackler, was rendered in violation of the laws of Arkansas, without proof or evidence to support the allegations of the complaint, as against them and their lands. They were persons before the court only by the constructive service of process, and the decree *pro confesso*, entered in the suit, on which the decree of sale was based, was not authorized by law, and so the decree of sale was rendered without due process of law, and in violation of the Constitution of the United States.

The statement as to notice, and as to the failure of the defendants to appear, in the record of the decree of sale (and the only statement on the subject in the record), follows the names of a great many persons, designated as defendants, and among them A. B. Ballard (but not Josephine W. Ballard), and it is as stated in the decree (Record, pp. 15-16), that they "were severally constructively summoned by publication in a newspaper published in Crittenden County, Arkansas, weekly, for four weeks before this day, proof of which has been previously filed herein, and all of the above named defendants, except A. H. Chatfield, the Memphis Land & Timber Company, and the Arkansas Land Company, having failed to plead, answer or demur to the complaint of the plaintiff, the court on motion of the attorney for the plaintiff, awards a decree *pro confesso* as to them, in favor of the plaintiff for the amount of the taxes, interest, penalty and costs due for their said lands." Then follows the hearing of the case as to A. H. Chatfield, and the other

defendants named, who had appeared and answered, and then the general decree against each of the defendants, in favor of the Board of Directors of the St. Francis Levee District, for the amount of the taxes, interest, penalty and costs assessed, levied and extended against the lands belonging to each, respectively, for the years 1893, 1894, 1895, 1896 and 1897, according to a list and tabulated statement, which the decree contains.

Record, pp. 17-18.

The only provision in the legislation, seeming to authorize an order *pro confesso* in the suit is in the form of the notice prescribed in Act No. 71 of the Acts of 1895, page 90, which prescribes that the persons and corporations are to be notified that they are required to make defense, or the suit will be taken for confessed, and judgment final entered, directing the sale of their lands for the purpose of collecting the delinquent levee taxes, interest, penalty and costs.

Taking this statement in the form of the notice, in connection with the direction to the court (page 91), that "in all cases where notice has been properly given as aforesaid, and where no answer has been filed * * * the court by its decree shall grant the relief as prayed in the complaint, and shall direct said commissioner to sell the lands described in the decree;" perhaps the act undertook to authorize the order *pro confesso*, and to dispense with evidence of the facts on which the suit was based.

Treating the provisions of the act as having that effect, we insist they and the order *pro confesso* are absolutely void as to A. B. Ballard and Josephine W. Ballard.

It appears from the decree of sale that the court treated the order *pro confesso* as conclusive of the facts on which the right to the decree of sale depended, and

without further hearing or further evidence, ordered the sale of the lands of A. B. Ballard and Josephine W. Ballard, and directed the commissioner to proceed and make the sale. And it must be conceded that if the order *pro confesso* was properly entered, and the case made in the complaint, and by the subsequent record were sufficient to justify the decree, that the order *pro confesso* was a sufficient basis for it.

Gordon v. Church, 11 Ark. 118.
Rose v. Woodruff, 4 Johnson's Chy. 547.
Thompson v. Wooster, 114 U. S. 104.

The right to enter the order *pro confesso* depended on the fact that the notice required had been given of the suit to A. B. Ballard and Josephine W. Ballard, and we have already argued that they had no such notice.

The effect of the order *pro confesso* depended on the sufficiency of the complaint taken in connection with the notice. They were required to set out substantially all the facts requisite to entitle the plaintiff to the decree of sale.

We have already argued that the complaint and notice did not contain the essential allegations required to support the suit, and authorize the decree. Assuming our positions to be true here, then the rule is established by the decisions, that the bill or pleading taken for confessed, to authorize a decree, must state all the facts necessary to entitle the plaintiff to the decree; especially in cases where the defendant has been brought before the court only by a published notice, or the constructive service of process. And the court can indulge no presumptions or inferences in support of the decree, but if the case made out in the pleading confessed does not authorize the decree, the decree is simply void.

Brodie v. Skelton, 11 Ark. 132.

Meux v. Anthony, 11 Ark. 424-425.
Fullerton v. Houpt, 12 Ark. 399.
Clark v. Strong, 13 Ark. 491.
Saffold v. Saffold, 14 Ark. 408.
Chaffin v. McFadden, 41 Ark. 42.
Railway Co. v. The State, 58 Ark. 39.
Cross v. Wilson, 52 Ark. 312.
Shriver's Lessee v. Lynn, 2 Howard 57-60.
Geary v. Sheridan, 8 Vesey 192.
Thomson v. Wooster, 114 U. S. 111-114.
Rose v. Woodruff, 4 Johnson's Chy. 546.

We go further and insist that the attempt made in the Act No. 71 of the year 1895, and in the present suit, to make the order *pro confesso* and the decree based on it conclusive against A. B. Ballard and Josephine W. Ballard (if the act bears the construction we have conceded for the purposes of the present argument), is void and without effect as to A. B. Ballard and Josephine W. Ballard, because in effect the act and the suit have undertaken to deprive them of their property without due process of law, and have denied to them within the State of Arkansas, the equal protection of the laws.

The general statute of Arkansas is as follows:

"The statements of the complaint as against a defendant constructively summoned, and who has not appeared, except such as are for his benefit, shall not be taken as true, but are to be established by proof.

Sandels & Hill's Digest, Sec. 5876.
Kirby's Digest, Sec. 6253.

The provision in Act No. 71 of the year 1895, on the subject of testimony (Acts of 1895, p. 92) is: "Said suit shall be conducted in accordance with the practice and proceedings of Chancery Courts, except that neither attorneys, nor guardians *ad litem*, nor any provision of Section 5877 of Sandels & Hill's Digest of the Statutes

of Arkansas, shall be required, and except that the suits may be disposed of on oral testimony, as in ordinary suits at law."

There is no express exception of Section 5876, of Sandels & Hill's Digest, or of its provisions by the act. See

Memphis Land & Timber Co. v. Board of Directors of St. Francis Levee District, 70 Ark. 410.

In Henry v. Blackburn, 32 Ark. 445, the Supreme Court held that it was the duty of the court below, in cases where the defendant was brought in by constructive service of process, to see that the complaint showed a cause of action within its jurisdiction, and necessarily, also, to see that the facts alleged in the complaint, to support the cause of action, were established by the proof, and that the former practice, which had prevailed, of taking decrees *pro confesso*, against a defendant served by publication of notice, and failing to appear, was not permissible under the present statute.

32 Ark. 448-450.
Bonner v. Little, 38 Ark. 401.
Welch v. Welch, 16 Ark. 527.
Games v. Stiles, 14 Peters, 330-332.

The Constitution of Arkansas provides (Article 2, Section 8), that no person shall be deprived of life, liberty, or property, without due process of law and (Article 4, Section 21) that no person shall be disseized of his estate, freehold, liberties, or privileges, or in any manner deprived of his property, except by the judgment of his peers, or the law of the land; and (Article 4, Section 22) that the right of property is before and higher than any constitutional sanction, and that private property shall not be taken, appropriated, or damaged for public use without just compensation therefor; and (Article 5, Section 24) that in all cases where a general law can be made applicable, no special law shall be enacted, and

that the operation of any general law shall not be suspended by the legislature for the benefit of any particular individual, corporation or association.

In the face of these provisions, and of Section 2, Article 4, of the Constitution of the United States, and the provisions of the 14th Amendment to that Constitution, it certainly cannot be maintained that the General Assembly of Arkansas, by Act No. 71 of the year 1895, involved here, as is claimed on behalf of Hunter and Hackler, could lawfully authorize the special suit provided for, and alter or change, as has been attempted there the general laws applicable to the conduct of that suit, considered as an ordinary suit in a court of law, or in a court of equity, and prescribe for it rules of evidence, different from the rules in other suits, and give an effect to the evidence, not given in other suits, or create evidence against A. B. Ballard and Josephine W. Ballard, in the suit against them, or their lands, which evidence would not be evidence against other persons, similarly situated in other ordinary suits, and then, in addition, cut off or destroy their right or remedy for defense to the suit, or against the enforcement of the decrees pronounced in it—they all the time being without notice of the suit, and non-residents of the State of Arkansas, and citizens, respectively, of Georgia and Florida. See—

Martin v. Barbour, 34 Fed. Rep. 701; and 140 U. S. 634.
Cunnius v. Reading School District, 198 U. S. 476-477.
Crowell v. Barham, 57 Ark. 195.

In the case of the Cairo & Fulton R. R. Co. v. Parks, 32 Ark. 131, the court after determining that the sale for the taxes involved there was void, and that the purchaser by his purchase acquired no title, considered the question, whether or not the purchaser was protected from

attack by the statute making the tax deed containing recitals proof of the facts necessary to make his purchase valid, or rather by the statute making the deed, without the recitals, proof of all the necessary facts—that is, whether or not the former owner was estopped by the tax deed, or its recitals, from attacking the title of the purchaser at the sale for taxes, for want of conformity to the requirements of the law.

The act of March 25, 1871, in question there, is to be found in substance in Gantt's Digest, Section 5206, and made the deed of the County Clerk acknowledged and recorded in the recorder's office, conclusive (amended now, Kirby's Digest, Sec. 7104, to be *prima facie*) evidence that each and every act and thing required to be done by the law had been complied with in making the sale for the taxes, and allowed such deed to be overcome only by proving (1) that the land was not subject to taxation; (2) that the taxes had been paid; (3) that the land had been redeemed before the execution of the deed; or (4) that the land was the property of a *feme covert*, an insane person, a minor, or a person in confinement at the time the sale was made and the deed executed.

See 32 Ark. 141, etc.

The court determined that the legislature had no power to make tax deeds, or the recitals in them, conclusive evidence of the facts recited, and that the furthest it could go was to make such deeds, or recitals, *prima facie* evidence of those facts, leaving parties in interest at liberty, when controversies arose, depending on those facts and involving their rights, to contradict the deed, or its recitals by other evidence. And see

Marx v. Hanthorn, 148 U. S. 172.
Turpin v. Lemon, 187 U. S. 59.

In Radcliffe v. Scruggs, 46 Ark. 97, Sec. 138 of the Act of April 8, 1869, was in question. It provided in

substance that all actions to test the validity of any proceeding in the appraisement, assessment, or levying of taxes, upon any land or lot, and all proceedings whereby is sought to be shown, any irregularity of any officer, or defect, or neglect thereof, having any duty to perform, under the provisions of the statute, in the assessment, appraisement, levying of taxes, or in the sale of lands, or lots, delinquent for taxes, or proceedings, whereby it is sought to avoid any sale under the provisions of the statute, for irregularity, or neglect of any kind, by any officer having any duty or thing to perform, under the provisions of the statute, shall be commenced within two years from the date of the sale, and not afterwards.

See Kirby's Digest, Sec. 7114.

The court held that the legislature could not enact a statute which will transfer one man's land to another under the guise of a tax sale for non-payment of taxes, when there had been no assesment or levy of taxes. Nor could the legislature prescribe any period within which the owner of the land must make his objections for such fundamental defects—he remaining in possession, and being in the case supposed, in no default for not paying his taxes.

It held further that the legislature has power to cure any illegality or irregularity in a tax sale, which consists in a mere failure to observe some requirement imposed, not by the Constitution, but by the legislature itself, and the non-observance of which does not deprive the former owner of any substantial right; and that the legislature may limit the time within which objections for such failure must be made, or be barred.

In Townsend v. Martin, 55 Ark. 192, the court declared that the rule announced in Radcliffe v. Scruggs was one upon which property rights were annually based—which should be finally settled, and that the court should decline

to disturb the rule, or even enter into a consideration of the question whether it was well founded or not.

55 Ark. 198-199.

It then announced that rule to be: That the statute under consideration in Radcliffe v. Scruggs, should not be construed to cut off any meritorious defense to a tax deed, such as a failure to publish notice of the sale for the full term required by the statute, prescribing such notice.

In Cooper v. Freeman Lumber Co., 61 Ark. 36, a sale of land for taxes, and for a clerk's fee of 25 cents for a certificate of purchase, and another fee of ten cents for transferring the tract on the books to the name of the purchaser, which were illegal charges, was held to be void, because of such illegal charges.

After referring to the Cairo & Fulton R. R. Co. v. Parks, and Radcliffe v. Scruggs, and quoting from the opinion in the latter case, the court said:

"Can it be doubted—in fact, is it not very clear—that to sell a landowners land for an amount not due upon it, and never levied upon it, and which, if levied, was unlawfully levied, has a direct tendency to injuriously affect his interest, and the power of the officer to sell for nonpayment? It is obvious that the defenses against the tax sale in this case are meritorious, as that term is defined in Radcliffe v. Scruggs, and by the weight of authority, and that the legislature cannot deprive the property owner of such defenses without in the language of Mr. Justice Smith, 'transcending the boundaries of its power.'"

61 Ark. 41.

And see:

Logan v. Eastern Arkansas Land Co., 68 Ark. 248.

In Alexander v. Gordon, 101 Fed. Rep. 92, the statute of Arkansas provided that no action to recover lands sold for taxes, or their possession, should be maintained, unless it appeared that the plaintiff, or those he claimed under was seized or possessed of the lands within two years next before suit brought. The sale for taxes was void, because (1) the list of delinquent lands and the notice of the sale was not recorded by the county clerk (Kirby's Digest, Sec. 7086); and (2) the sale was made for taxes levied in excess of the limit prescribed by law, wherefore the officer making the sale was without jurisdiction or authority to make it. The purchaser had possesion for two years, claiming under the tax sale.

The court held that such possession, under the statute, could not operate to deprive the former owner of his lands, or the right to recover possession of them in the suit, as such a construction of the statute would make it an arbitrary enactment, depriving such owner of his property without due process of law.

In the course of the opinion, Sanborn, Circuit Judge, said that the real question involved was whether one who holds possession of land for two years under a sale clearly void upon the face of the proceedings, evidencing it, might thereby deprive the owner of the land of his title to it under the statute, without a trial, hearing or notice. He said, while it was difficult and unwise to undertook accurately to define "due process of law," such process must be a course of legal proceedings, according to those rules and forms which have been established for the protection of private rights. It must be appropriate to the case, and just to the party affected. It must give to the parties affected, an opportunity to be heard respecting the justice of the disposition of the title it seeks to divest. It is plain that the legislature cannot enact that the property of "A" shall become the property of "B."

After having made these statements, the judge proceeded:

"It is undoubtedly competent for the legislative department to enact reasonable statutes of limitation, to provide that the adverse possession of lands for a reasonable time, under a tax or judicial sale shall cure mere irregularities in the proceedings upon which it rests. But a provision that the possession of land for the limited term of two years under a purchase at a tax sale, which clearly appears upon its face to be void, because the officer who made it had no jurisdiction or authority to effect it, and because it was made for taxes levied in excess of the limit prescribed by law, is not process of law, but is a mere legislative *fiat*, and in violation of the fundamental principle of our jurisprudence. If this was the purpose and intent of the legislature of Arkansas in the passage of this act of limitation, the law could not be sustained." 101 Fed. Rep. 96-97. And see:

Caldwell v. Barrett, 71 Ark. 310.
Bagley v. Casteel, 42 Ark. 77.
Files v. Fuller, 44 Ark. 273.
Shaw v. Hill, 46 Ark. 333.
Thweatt v. Howard, 68 Ark. 431-432.
Dash v. Van Kleeck, 7 Johnson (N. Y.) 477, 508, etc.
Denny v. Mattoon, 2 Allen (Mass.) 361, 380.
Greenough v. Greenough, 11 Penn. St. 489, 495.
Groesbeck v. Seely, 13 Mich. 330.
Pryor v. Downey, 50 Cal. 388.
Martin v. Snowden, 18 Grattan (Va.) 100.
Bannon v. Burnes, 39 Fed. Rep. 893.
Black on Tax Titles (1st Ed.), Sec. 253.
Cooley on Taxation (1st Ed.), Chap. 15, 355-356.
Cooley's Constitutional Limitations (6th Ed.), 452-453.

There is no difference in substance between taking the property of A. B. Ballard and Josephine W. Ballard in this suit under the form of a decree, or order *pro con-*

fesso against them, or establishing the facts on which the suit is based against them without proof or evidence, and without allegations in the complaint supporting such decree, and taking such property under color of a deed, falsely reciting facts which they are not permitted to contradict, or taking their property by holding it adversely to them for a limited time under the color of a deed passing no title and void on its face. They were absent from the State, it is true, but they were living in their own homes in Georgia and Florida, and guilty of no default or dereliction of duty in being there. They did not know of the suit, and had no notice of it enabling them to make any defense to it. The people who conducted the suit made up the record, and are now seeking the benefit of that record to shield themselves, or those taking title under what they have done, against facts which existed, and which show, when before the court, that the suit was unlawfully begun, unlawfully conducted, and unlawfully ended, in the decree of sale of the 14th of February, 1898, whereby their property was ordered to be sold, and the title to be passed— the whole proceeding taking only the time between the 21st of December, 1897, and the 14th of February, 1898.

Memphis, Tenn., Oct. 5, 1906.

WM. M. RANDOLPH,
GEORGE RANDOLPH,
WASSELL RANDOLPH,
Of Counsel for A. B. Ballard and Josephine W. Ballard.

APPENDIX.

ACT XIX.

AN ACT TO LAY OFF AND ESTABLISH THAT PART OF THE ST. FRANCIS BASIN LYING WITHIN THE STATE OF ARKANSAS INTO A LEVEE DISTRICT, AND FOR PROTECTING AND MAINTAINING THE SAME, AND TO INCORPORATE A BOARD OF LEVEE DIRECTORS FOR SAID DISTRICT, AND FOR OTHER PURPOSES.

Section 1, as amended by Act No. LXXV. of the same session of the General Assembly (Acts of 1893, p. 119), prescribed (1) the boundaries of the Basin created as the Levee District; (2) it named the individuals who were appointed Levee Directors for each county within the Levee District, and the terms of office of each person. It then declared as follows: "The directors herein named and their successors in office shall constitute and are hereby declared to be a body politic and incorporated by the name and style of the Board of Directors of the St. Francis Levee District, and by that name may sue and be sued, plead and be impleaded, and have perpetual succession for the purposes hereinafter designated. They may have a common seal, and may make such by-laws and regulations, from time to time, as they may deem proper, not inconsistent with this charter and the laws of this State, for the purpose of carrying into effect the objects of their incorporation. They may appoint all officers and agents, which they deem necessary and suitable in the conduct of the business of said corporation, and may do all other acts and things not inconsistent

with the laws of this State, which may be proper to carry into effect the purposes and objects of this act."

Section 3 authorized the governor to appoint one levee director annually for each county.

Section 4 authorized the Board of Levee Directors to levee the St. Francis front in Arkansas, and to protect and maintain the same, and, in order to do so, to rebuild and repair or raise levees on the right bank of the Mississippi River and such other places as the board might select, and authorized the board to employ all necessary agents, and also to determine the crown, height, slopes and grade of the levee, and make all needful regulations, and to do all acts in their opinion necessary to secure the Levee District under their charge from overflow from the waters of the Mississippi River.

"Section 5. That for the purpose of building, repairing and maintaining the levee aforesaid, and for carrying into effect the objects and purposes of this act, the Board of Levee Directors shall have the power, and it is hereby made their duty, to assess and levy annually a tax not exceeding five per cent. of the increased value or betterment estimated to accrue from protection given against floods from the Mississippi River by said levee, on all lands within said Levee District. Provided, that said Board of Directors shall call a meeting of the land owners in each of the respective counties within said Levee District in each county, by posting notices of the time and place of said several meetings, in ten conspicuous places in each county ten days before the day fixed for the meeting, at which time the proposition to levy said annual assessment shall be submitted to said land owners, and if a majority of all the land owners in such Levee District shall appear at said meeting, in person or by their legal proxies, and two-thirds of these shall vote for such assessment, it shall then be the duty of said Board of

Directors to levy said tax. Said meeting shall be held by said directors in each county, who shall appoint two clerks of election; the said directors and clerks shall perform their respective duties under oath to hold the election fairly and to make returns of the election fairly to the secretary of said Levee Board, who shall, with the president and treasurer of said board, proceed to canvass the returns and declare the result, and if it shall appear from the returns that two-thirds of the land owners represented at said meeting voted for said annual assessment, and if the said board shall be satisfied that a majority of all the land owners of said district were represented at said meeting, then the said president of said board shall give notice of the fact throughout the said Levee District, and the tax shall be levied as hereinafter provided, and the annual levy of said five (5) per cent. shall continue as long as it is found to be necessary to accomplish the object of this act, and when no longer needed, the president shall notify the assessor and direct him not to assess for this purpose. Provided further, that if the estimated cost of construction of said levee shall exceed 2 per cent. of the increased value of said land in said district as assessed, the Board of Directors may, at their discretion, submit a proposition to the land owners of said district to assess a tax on said increased value of lands not to exceed 2 per cent. per annum for so many years as may be necessary to raise a fund equal to the estimated cost of said levee. The proposition above recited shall be submitted to the land owners of said district by the Board of Directors calling a meeting of said land owners in each county in said district, by giving ten days' notice by posting same in ten conspicuous places in each county, and if a majority of said land owners of said district shall attend the several meetings in said districts, and two-thirds of those attending vote for said taxation, the assessment shall be made by said board and the proceeds used for the construction of said levee."

"Section 6. That said Board of Levee Directors hereby created shall and are hereby declared to be the legal successors of the now existing Levee Board of St. Francis Levee District, and all books, papers and proceedings of the present board shall become a part of the books, papers and proceedings of the board hereby created, and shall be delivered to same as soon as organized. The said Levee Board hereby created shall organize by electing a President, a Secretary, a Treasurer and a Chief Engineer, and prescribe the duties and fix the salaries of said officers; provided, that any officer of the board who is not a member shall have no vote in said board. Said officers shall be elected for two years after the first annual meeting of said board, and biennially thereafter at regular meetings of said board."

"Section 7. It shall be the duty of said Board of Directors to elect one assessor, a land owner in said district, from each county in said district, who shall compose a Board of Assessors for said Levee District, and shall, each for the county he represents, make an assessment of all the lands in the district, in books to be provided by the Levee Board for that purpose. The said lands shall be entered upon said books in convenient subdivisions, as surveyed by the United States government, with appropriate columns showing the names and residences of owners of said lands, and mortgages of record, if any, known to the assessors; also a description of said land, the number of acres cleared, as nearly as said Assessor can ascertain without measurement; the value thereof as assessed without levee protection, and the value threof as estimated, increased by levee protection; provided, that railroad rights of way, including roadbed in said Levee District, shall be assessed according to the betterment and increase in value as real estate, herein referred to, and may be assessed per mile instead of per acre; provided further, that no error in the description of said lands shall invalidate said assessment, if sufficient description is given to ascertain where the land is situated."

"Section 8. That said Assessors shall make their assessments beginning the first Monday in April and completing the same by the first Tuesday in May, and shall so report to the Secretary of the Levee Board on or before the second Tuesday in May. They shall hold a meeting at the office or place of business of said Levee Board on the second Tuesday of May next after completing said assessment. They shall elect a Chairman and Secretary and keep a record of their proceedings; they shall compare and equalize their assessments and correct their books to conform to said equalization, and their assessments as equalized shall be the assessment of said Levee District for that year and until the next assessment. Said Assessors shall hold office for two years, and until their successors are elected and qualified, and shall receive for their work such compensation as county assessors receive for similar work. In all meetings of said Board of Assessors, a majority thereof shall be sufficient as a quorum for the transaction of all business."

"Section 9. That said Board of Levee Directors shall hold a regular or annual meeting on the second Tuesday in May of each year at such place as they may select as the domicile of the board, and such other meetings as their by-laws may provide for, and seven members present shall constitute a quorum for the transaction of such business as may properly come before said board. At each regular meeting the President shall lay before the board the annual report of the Chief Engineer, with the maps, papers and estimates accompanying same. Also the last assessment, showing the aggregate sum upon which a tax for levee purposes may be levied, and a report of the Treasurer of said board, showing the financial condition of said Levee District. After an examination of said reports, the said Levee Board shall decide what work they will undertake to do during that official year, and the rate per cent. on the aggregate increased value of lands in said Levee District that will be necessary to raise a sum sufficient to pay for said work, as provided in

Section five (5) of this act, provided the said tax shall not exceed five per cent., as provided."

"Section 10. That said assessment shall be a lien on said lands in the nature of a mortgage, and shall bear interest at the rate of six (6) per cent. per annum from thirty days after the first Monday in October."

Section 11 is replaced by the Act of 1895, which is copied as the substitute for it.

"Section 12. All persons having an interest in said lands, or recorded liens therein, shall be bound thereby and by the judgment and decree rendered therein, in the same manner as in other Chancery suits, saving to infants and insane persons having no guardian or curators the rights they now have by law to appear and except to said proceedings within twelve months after their disabilities are removed."

Section 13 is replaced by the Act of 1895, which is copied and is the substitute for it.

Section 14 is prescribed the bond of the Levee Tax Collector and provided for his settlements.

Section 15 provided for contracts for work to be done and regulated the letting of contracts for such work.

Section 16 regulated the execution of the work, the payments to be made, and the settlements for the work.

Section 17 prescribed the bond of the Treasurer of the Levee Board, and made the Treasurer the financial agent of the board, and authorized him to receive and receipt for all funds due the Levee District, and to pay out the same only upon the warrants of the Secretary, endorsed by the President.

Section 18 prescribed the compensations of the Board of Directors, and provided for salaries for the officers of the board.

Section 19 authorized the condemnation of the right of way for the levee where it could not be obtained by gratuitous relinquishment.

"Section 20. For the purpose of keeping the levee in said district in repair, after the levee contemplated by this Act shall have been completed, and to meet the incidental and contingent expenses of the district, there shall be levied and collected off the lands as reported benefited by said Assessors, an annual tax not to exceed five mills on the dollar of the value of such lands as assessed for State and county purposes, to be levied, extended and collected as State and county taxes are now collected, by the officer authorized to levy and collect the said tax, said taxes to be extended on the tax books of the county against the lands so taxable, as aforesaid, and to be paid over by the county collector to the treasurer of said Levee District, in coin or legal tender currency of the United States, to the credit of said Levee District. Provided, that the amount of said tax, not exceeding the rate per cent. aforesaid, shall be voted at a meeting of land owners in each county in said district called by notice, as required by Section five of this Act, at which there shall be present, at the several meetings herein provided for, within said district, either in person or by their agents or attorneys, authorized to act for them, a majority of the land owners of said district, and two-thirds of those present voting for said tax, and the same so certified to the County Courts of the several counties in the said district, by the Secretary of the said Levee Board, on or before the day fixed by law for fixing the county levy and making annual appropriations for the county. Provided, that the said Board of Directors herein named may at any time after organizing submit to the land owners in the several counties in said district, which failed to hold such meetings on October 1, 1892, by the methods herein provided, a proposition to levy a tax of one mill on the dollar to pay all expenses herein enumerated for the current year. The votes so taken shall be added to the votes of those coun-

ties taken October 1, 1892, by the President of said board, and if a majority of the land owners of said district are found to have voted, and two-thirds of those voting for tax, said tax shall at once be placed on the tax books of the several counties, and be collected and paid over to the Treasurer of said Levee Board, as herein provided."

Section 21 authorized the Board of Directors to consolidate with the Levee District in Missouri upon prescribed conditions.

Section 22 provided for the issuance of evidence of indebtedness by the Levee Board.

Section 23 repealed all laws in conflict with the Act.

Section 24 declared it took effect from and after its passage.

ACT LXXI.

Be it enacted by the General Assembly of the State of Arkansas:

Section 1. That Section 11 of the St. Francis Levee Act of the General Assembly of the State of Arkansas, of February 15, 1893, be amended so as to read as follows:

Said Board of Directors shall elect one collector for each county herein named, who shall be furnished by the Secretary of said board with a list of said assessments of the county for which he is collector, and he shall, on the first Monday in October of each year, proceed to collect said assessments, and if said assessments are not paid within thirty days, a penalty of 25 per cent. shall at once attach for such delinquency, and said Board of Directors shall enforce the collection of the whole by Chancery proceedings in a court of the county in which said lands are situated having chancery jurisdiction, and said court shall give judgment against the persons claiming to be the owners of such lands, if known to said board, for

the amount of such assessments, and said penalty of twenty-five per cent. and interest on said assessment from the end of said thirty days allowed for collection thereof, at the rate of six per cent. per annum, and all cost of the proceedings. If the ownership of any such delinquent lands be unknown to said board, such lands may be proceeded against as above set forth, for the collection of said assessments, penalty, interest and costs due thereon, as being owned by unknown owners. Said judgment shall provide for sale of said delinquent lands for cash, by a commissioner of the court, after advertisement as hereinafter set out. Said proceedings and judgment shall be in the nature of proceedings *in rem*, and it shall be immaterial that the ownership of said lands may be incorrectly alleged in said proceedings; and such judgment shall be enforced wholly against said land, and not against any other property or estate defendant. All or any part of said delinquent lands for each of said counties may be included in one suit for each county, instituted for the collection of said delinquent taxes, etc., as aforesaid, and all delinquent owners of said land, including those unknown, as aforesaid, may be included in said one suit as defendants; and notice of the pendency of such suit shall be given as against non-residents of the county and unknown owners, respectively, when such suits may be pending, by publication weekly, for four weeks prior to the day of the term of court on which final judgment may be entered for the sale of said land, in some newspaper published in the county where such suit may be pending, which public notice may be in the following form:

"*St. Francis Levee District*

vs. *NOTICE.*

"*Delinquent Lands.*

"The following named persons and corporations, and all others having or claiming an interest in any of the following described lands, are hereby notified that suit is

pending in the Circuit Court of ———— County, Arkansas, to enforce the collection of certain levee taxes on the subjoined list of lands, each supposed owner's lands being set opposite his or her or its name, respectively, together with the amounts severally due from each, to-wit."

Then shall follow a list of supposed owners, with a descriptive list of said delinquent lands and amounts due thereon, respectively, as aforesaid; and said published notice may conclude in the following form:

"Said persons and corporations, and all others interested in said lands, are hereby notified that they are required by law to appear and make defense to said suit, or the same will be taken for confessed, and judgment final will be entered directing the sale of said lands for the purpose of collecting said delinquent levee taxes, together with the payment of interest, penalty and costs allowed by law.

———————

"Clerk of Said Court."

And where the owners are unknown, that fact shall be so stated in said published notice. And as against any defendant who resides in the county where such suit may be brought, and who appears by the record of deeds in said county to be the owner of any of the said lands proceeded against, notice of the pending suit shall be given by the service of personal summons of the court, at least twenty days before the day on which said defendant is required to answer, as set out in said summons. And said suit shall stand for trial at the first term of the court after the complaint may be filed, if said four weeks in the case of a non-resident or unknown defendant, as aforesaid, or said twenty days in the case of resident defendants, as aforesaid, shall expire either before the first day of the term or during the term of court to which said suits are brought, respectively, unless a continuance is granted for good cause shown, within the discretion of the court; and such continuances, for good cause shown, may be

granted as to a part of said land or defendants, without affecting the duty of the court to dispose finally of the others, as to whom no such continuances may be granted; and in all cases where notice has been properly given as aforesaid, and where no answer has been filed, or, if filed and the cause decided for the plaintiff, the court, by its decree, shall grant the relief as prayed in the complaint, and shall direct said commissioner to sell the lands described in the decree at the courthouse door of the county wherein the decree is entered, at public outcry, to the highest bidder, for cash in hand, after having first advertised such sale (such advertisement may include all the lands described in the decree) weekly for two weeks consecutively, in some newspaper published in the county, if there be one, and if no such newspaper, then that such advertisement be published in some newspaper of an adjoining county; and if all of the lands be not sold on the day as advertised, such sale shall continue from day to day until completed, and said commissioner shall, by proper deeds, convey to the purchasers the lands so sold, and the titles to said lands shall thereupon become vested in such purchaser as against all others whomsoever, saving to infants and insane persons the rights given them by Section 12 of said Act of February 15, 1893.

Provided, that in any case where lands are offered for sale by said Commissioner, as provided by the (this) Act, and the sum of the tax due, together with the interest, costs and penalty, is not bid for the same, the said commissioner shall bid the same off in the name of the said Board of Directors of the St. Francis Levee District, bidding therefor the whole amount due as aforesaid, and shall execute his deed therefor, as in other cases under this Act, conveying such lands to said Levee Board, and such deeds, when duly executed in conformity to the provisions of this Act, and recorded, shall be received as evidence in all cases, showing an indefeasible title to such purchasers, unassailable in either law or equity.

Provided, that at any time within three years after the rendition of the final decree of the Chancery Court herein provided for, the owner of the lands may file his petition in the court rendering the decree, alleging the payment of the taxes on said lands for the year for which they were sold, and upon the establishment of that fact the court shall vacate and shall set aside said decree.

And provided further, actual service of summons shall be had where the defendant is in the county or where there is an occupant upon the land.

Section 2. That Section 13 of said Act be amended so as to read as follows: Said suit shall be conducted in accordance with the practice and proceedings of Chancery Courts in this State, except as herein otherwise provided, and except that neither attorneys nor guardians *ad litem*, nor any provision of Section 5877 of Sandels & Hill's Digest of the Statutes of Arkansas, shall be required, and except that said suits may be disposed of on oral testimony, as in ordinary suits at law; and this law shall be liberally construed to give said assessment lists the effect of *bona fide* mortgages, for a valuable consideration, and a first lien upon said land as against all persons having an interest therein. Provided, that no informality or irregularity in holding the meetings or in the description of valuation of the lands, or in the names of the owners or the number of acres therein, shall be a valid defense to such action. Provided, that in cases where the decrees may have already been rendered by the courts for the collection of delinquent taxes under the Act of which this Act is amendatory, and where no bond has been executed by the plaintiff in favor of the defendant, as required by the second subdivision of said Section 5877 of Sandels & Hill's Digest, such decrees shall be as valid and binding as if said bond had been (duly) executed and filed; and provided further, that as regards all suits for the collection of said levee taxes that may be pending at the date of the passage of this Act, said Section 5877 of said Digest

shall not apply, and this Act shall otherwise apply to all such suits as may be brought or pending at the date of the passage of this Act.

Section 3 amends Section 15 of the original Act, having reference to the bonds to be executed by contractors doing levee work.

Section 4 exempts lands in the Levee District lying between the levee and the Mississippi River from taxation for levee purposes.

Section 5 authorizes the St. Francis Levee Board to employ an attorney at a salary and traveling expenses.

Section 6 prohibits the increase of the rate of taxation for levee purposes, and provides that no assessments or collections under the Act shall be made or enforced after January 1, 1906, excepting assessments made before that date.

Section 7. That all laws of this State in conflict with this Act be, and the same are hereby, repealed, and that this Act take effect and be in force from and after its passage.

Approved April 2, 1895.